92-546

NO. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1992

The Washington Water Power Company,

Petitioner,

v.

Spokane Indian Tribe,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
Docket No. 91-35000
VOLUME II

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NO. 91-35000

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPOKANE TRIBE OF INDIANS,
Plaintiff/Appellant,
vs.
STATE OF WASHINGTON,
Defendant,

and

WASHINGTON WATER POWER COMPANY,
Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF WASHINGTON
NO. CV-82-00753 AAM

APPELLEE WASHINGTON WATER POWER COMPANY'S SUPPLEMENTAL EXCERPTS OF RECORD VOLS. I AND II

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS,	)	No. C-82-753-AAM
Plaintiff,	)	STATEMENT OF FACTS IN
v.	)	SUPPORT OF WWP'S
STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY,	)	MOTION FOR SUMMARY JUDGMENT BASED ON STATUTES OF LIMITATIONS, RES JUDICATA, COLLATERAL ESTOPPEL, EQUITABLE ESTOPPEL OR ESTOPPEL BY DEED, AND LACHES
Defendant.	)	

The Washington Water Power Company (WWP), by and through its undersigned

attorneys, submits the following separate Statement of Facts pursuant to Local Rule LR 56 in support of WWP's Motion for Summary Judgment of Dismissal of the claims of The Spokane Tribe of Indians (Tribe) against WWP with prejudice based on the application of statutes of limitation, and the Doctrines of Res Judicata, Collateral Estoppel, Estoppel by Deed, and Laches.

1. There is no evidence that Congress ever intended to grant, convey, or reserve the Spokane River in the vicinity of Little Falls for the use of the Tribe.

2. Congress authorized the granting of all property rights necessary or appropriate for the construction, operation, and maintenance of hydroelectric developments on the Spokane River in the vicinity of the Spokane Indian Reservation and David Wilson and

WWP complied with all laws and regulations and made all payments and were granted all rights, title, and interest necessary for the construction, operation, and maintenance of the Little Falls Hydroelectric Development on the Spokane River by the United States. (WWP Request for Admissions, Doc. M, and Dellwo Affidavit, Doc. No. 46.)

3. WWP constructed the Little Falls Hydroelectric Development from 1908 to 1911 at a cost in excess of $1.5 million in reliance upon the rights acquired by David Wilson and WWP from the United States and has continuously operated and maintained the Little Falls Hydroelectric Development since 1911 to produce electrical power which is sold and distributed to WWP's customers. (Olson Affidavit.)

4. At the time WWP constructed the Little Falls Hydroelectric Development

from 1908 to 1911, the United States and its agents and representatives knew that said project included a dam in the river and intended that the project include a dam in the Spokane River and knew that whatever effect the dam would have on the river and any fishery in the river would occur and did occur. All actions taken by WWP with respect to the construction, operation, and maintenance of the Little Falls Hydroelectric Development were authorized by the Act of March 3, 1905 (33 Stat. 1006) and the regulations promulgated thereunder, and were made with the concurrence and consent of the Secretary of the Interior, the Commissioner of Indian Affairs, and the Indian agents who had jurisdiction over the Spokane Indian Reservation.

5. On or about February 5, 1971, The Spokane Tribe of Indians filed a Petition to Intervene before the Federal

Power Commission and served a copy on Alan P. O'Kelly, a retired partner of the undersigned attorneys. (A copy of the Petition is attached to the Affidavit of Jerry K. Boyd dated October 6, 1989.) In that Petition to Intervene, the Spokane Tribe of Indians claimed that the Federal Power Commission had jurisdiction to decide the property rights of WWP and to provide for the payment of compensation to the Tribe for all damages claimed to have arisen from the construction, operation, and maintenance of the Little Falls Hydroelectric Development. (Id.) WWP claimed that the Federal Power Commission, which later became the Federal Energy Regulatory Commission (FERC), had no jurisdiction to determine the property rights of WWP. At the request of the Spokane Tribe of Indians (through its attorney, Robert D. Dellwo) and the Secretary of the Interior on behalf of the

Tribe, FERC took jurisdiction over the subject matter, held evidentiary hearings at which time all parties had an opportunity to present whatever testimony they thought relevant to the claims made by the Tribe, and made various findings and conclusions. (Affidavit of Jerry K. Boyd dated October 6, 1989) WWP sought judicial review of the findings and conclusions made by the FERC. The FERC was reversed and, based upon the record which included the same documents presented to this Court by the Tribe, determined, as a matter of law, that WWP acquired all rights, title, and interest necessary for the construction, operation, and maintenance of the Little Falls Hydroelectric Development from the United States under the Act of March 3, 1905, and the regulations promulgated thereunder. (Washington Water Power Co. v. Federal

Energy Regulatory Commission, 775 F.2d 305 (D.C. Cir. 1985))

6. Any employees of the Washington Water Power Company who were involved in the construction and the initial operation of the Little Falls Hydroelectric Development are long since deceased. Due to the passage of approximately 80 years since the construction of the Little Falls Hydroelectric Development, the ability of WWP to find witnesses or documents which may have supported a defense of WWP against the claims made by the Spokane Tribe, particularly as such claims relate to any fishery that may have existed at Little Falls and the effect of the construction of the Little Falls Hydroelectric Development on such fishery, has been severely prejudiced. There is no practical way to avoid such prejudice.

7. The Spokane Tribe of Indians either made or could have made a claim

against the United States under the Indian Claims Commission Act of 1946 (60 Stat. 1049, et seq.) for all losses or damages or all adverse effects incurred by the Spokane Tribe which may have arisen out of the construction, operation, and maintenance of the Little Falls Hydroelectric Development under and in accordance with the Act of March 3, 1905, as administered by the Secretary of the Interior and the Department of the Interior. The Spokane Tribe of Indians either made such a claim and were duly compensated for such claim before the Indian Claims Commission under Docket No. 331 or failed to make such claim.

DATED this 6th day of October, 1989.

PAINE, HAMBLEN, COFFIN, BROOKE & MILLER

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS,	)	No. C-82-753-AAM
Plaintiff,	)	PLAINTIFF'S OBJECTION TO DEFENDANT TWWPCO'S STATEMENT OF FACTS IN SUPPORT OF DEFENDANT'S SECOND SUMMARY JUDGMENT MOTION
v.	)	
STATE OF WASHINGTON; and WASHINGTON WATER POWER COMPANY CO.,	)	
Defendants.	)	

THE PLAINTIFF, SPOKANE TRIBE OF INDIANS, a federally recognized Tribe, by its undersigned attorneys, does object and controvert the facts set forth by TWWPCO in its Statement of Facts. The basis for such objection is as follows:

I.

There is substantial evidence that congress did intend to grant, convey and reserve the Spokane River in the vicinity of the Little Falls for the use of the Tribe. (Affidavit of Fahey, September 26, 1989, paragraphs 7, 8, 9, 11 and 12, Exhibits 3-10).

II.

There is substantial disagreement as to what Wilson and TWWPCO obtained under the Act of March 3, 1905 and whether TWWPCO made all payments required. (Affidavit of Fahey, September 26, 1989, paragraph 22, Exhibits 14 and 15). The documents relied upon by TWWPCO for the facts set forth in paragraph 2 do not address any property rights. (TWWPCO Requests for Admissions document M and Dellwo Affidavit, document 46).

III.

There is nothing in the Olsen Affidavit referred to as the justification for the statement in paragraph 3 to indicate that WWP was acting in reliance upon the rights acquired by David Olsen and WWP from the United States. In fact, there were a number of questions in the mind of the employee's and agents of TWWPCO as to what was actually obtained. (Affidavit of Fahey, September 26, 1989, paragraph 22, Exhibits 14 and 15).

IV.

Defendant TWWPCO has not offered any support for its statements in paragraph 4. The Plaintiff objects to these facts as they are not supported by any evidence.

V.

The Federal Energy Regulatory Commission did not consider matters set forth in the Tribe's petition to intervene. All that was determined in the

F.E.R.C. proceeding was that the Little Falls Dam facility was exempt from licensing under the Federal Power Act, and that F.E.R.C. had no jurisdiction to consider the Tribe's claims arising out of the wrongs committed by TWWPCO. (Affidavit of Dellwo in Support of Plaintiff's Motion to Strike Defenses and in Opposition to Defendant's Second Motion for Summary Judgment, Exhibit 1).

VI.

Plaintiff's object to the statement that TWWPCO has been severely prejudiced by this passage of time. In fact, TWWPCO knew from the beginning that there were overriding doubts as to what had been actually conveyed pursuant to the Act of March 3, 1905. It attempted to secure an unqualified patent to clarify its rights, but received instead, the ambiguous grant of 1924. It did nothing further to clarify its rights. Further, there is no evidence

in the record to support these statements. (Affidavit of Fahey, September 26, 1989, paragraph 22, Exhibits 14 and 15). In addition, Plaintiff believes TWWPCO has substantial files and records dated back to the turn of the century that have been utilized by TWWPCO in this proceeding and in the proceeding before F.E.R.C. without any prejudice.

VII.

The Spokane Tribe of Indians did not make any claim under the Indian Claims Commission Act of 1946 for losses, damages or adverse affects incurred by the Spokane Tribe which may have arisen out of the construction, operation and maintenance of the Little Falls hydroelectric system. With congressional approval, such a claim against the United States could still be filed. The Spokane Tribe was not compensated for any such claim before the Indian Claims Commission. The claims in

this proceeding are not claims which the Tribe could bring against the United States. 25 U.S.C. §2415 allowed this claim against TWWPCO to be filed after the year of 1982. This claim was properly brought within the dictates of that statute.

DATED this 19th day of October, 1989.

DELLWO, RUDOLF & SCHROEDER, P.S.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS,	)	No. C-82-753-AAM
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DISMISSAL OF THE CLAIMS OF THE TRIBE BASED ON STATUTES OF LIMITATIONS, RES JUDICATA, COLLATERAL ESTOPPEL, AND LACHES
v.	)	
STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY,	)	
Defendant.	)	

The Washington Water Power Company (WWP), by and through its undersigned attorneys, submits the following

Memorandum of Authorities in support of its motion for an order dismissing the claims of the Spokane Tribe of Indians (Tribe) against WWP in this proceeding. WWP alleges that the claims made by the Spokane Tribe of Indians against WWP are barred by statutes of limitations, and the application of the doctrines of res judicata, collateral estoppel, estoppel by deed, and laches. The facts are shown in the statement of facts.

I. TRIBE'S CLAIM IS BARRED BY 25 U.S.C. 70(u).

In 1946, the United States Congress passed the Indian Claims Commission Act (60 Stat. 1049, et seq.). The Indian Claims Commission Act established the Indian Claims Commission to hear all claims the Tribe may have against the United States which arose prior to 1946. The claims were basically any claim on any basis. See 25 U.S.C.S. § 70(a)

(1983). The Tribe filed a claim before the Indian Claims Commission Act in Docket 331. That claim has been duly adjudicated, settled and compromised. 17 Ind. Claims Comm. 584-614. A final judgment was entered which provided for payment to the Tribe of $6,700,000. That final judgment was entered on February 21, 1967. Under the application of Section 22 of the 1946 Indians Claims Commission Act (25 U.S.C.S. § 70(u)), all claims that the Tribe either brought or could have brought are deemed finally adjudicated and all claims that the Tribe either brought or could have brought against the United States are now barred.

How does the statute apply in this case? WWP acquired its rights from the United States by Act of Congress dated March 3, 1905. The Secretary of the Interior approved applications of David Wilson and WWP for land and approved the

use of the lands on and along the Spokane River for the construction of the Little Falls Hydroelectric Development, which WWP finally constructed. Any claim that the Spokane Tribe was damaged or harmed in some way occurred as a result of a taking authorized by the Act of March 3, 1905. Under the Indians Claims Commission Act, the Tribe could have made any claim which they now attempt to make against the United States since it was the United States that authorized the construction of the Little Falls Hydroelectric Development. The Tribe either made such a claim or could have made such a claim. Regardless, any such claim against the United States is now barred by Section 22 of the Indian Claims Commission Act. See United States v. Dann, 470 U.S. 39, 105 S.Ct. 1058, 84 L.Ed.2d 28 (1985) (which reversed United States v. Dann, 706 F.2d 919 (9th Cir. 1983).

Any claim that the Tribe may have had with respect to the Spokane River must now be deemed to be extinguished by operation of the Act of March 3, 1905, and the grants made to David Wilson and WWP, and by operation of the Indian Claims Commission Act. See United States v. Dann, supra and United States v. Dann, 865 F.2d 1528, 1532-1536 (9th Cir. 1989). Therefore, the claim of the Tribe with respect to the Little Falls Hydroelectric Development is now barred and any title the Tribe may have had in the Spokane River has been extinguished.

II. THE TRIBE'S CLAIM IS BARRED BY 43 U.S.C.A. § 1166.

After the United States has issued a patent, the United States is barred from challenging such patent after six years from the date of issuance. 43 U.S.C.A. § 1166 (1986). The only exception is if the patent was issued due to fraud or

some other equitable ground. Here the land was granted by approval of applications and maps in 1905, 1906, and 1908, and the approval of joint surveys in 1910. Furthermore, a formal document in the nature of a patent was issued by the Secretary of the Interior in 1924. It is far too late for the United States to bring an action to challenge the patent issued to WWP .

Essentially, in this case, the Tribe is attempting to collaterally attack the patent and rights granted by the Secretary of the Interior pursuant to the Act of Congress of March 3, 1905. Under 43 U.S.C.A. § 1166, the United States could not bring such an action. Any claim of the Tribe to a compensable interest in the lands at issue must arise from some treaty of Act of Congress. Sioux Tribe of Indians v. United States, 316 U.S. 317, 326 (1942). Absent some congressional

conveyance, the Indians have no interest in the bed of the Spokane River. Id; United States v. Aam, 9th Cir. Slip Op. in Docket No. 88-3594, 9th Cir., October 2, 1989, at p. 8, 1989 Barkley's Law Publishers, 12191-12198. There is no showing in this case that there was any grant of the Spokane River to the Spokane Tribe by Congress.

After the issuance of the patent or the equivalent of a patent to David Wilson and WWP prior to 1925, not even the United States can challenge the rights acquired by WWP. Even if there was some conveyance by the United States after the conveyance and grant to David Wilson and WWP, such an attempt at conveyance by the United States would have been null and void and of no effect. Here, there is not once scintilla of evidence showing that Congress ever

authorized the conveyance of the Spokane River to the Tribe.

III. THE CLAIMS OF THE TRIBE ARE BARRED BY THE DOCTRINE OF RES JUDICATA.

Once a party puts an issue a right, question, or fact and such issue is determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). Here, the issue that the Court is being asked to determine is whether or not WWP has the rights, title and interests necessary for the construction, operation and maintenance of the Little Falls Hydroelectric Development. That issue was presented to the United States Court of Appeals for the District of Columbia in Washington Water Power Co. v. F.E.R.C.,

775 F.2d 305 (D.C.Cir. 1985). In that case, the Tribe elected to present the issue to the Federal Power Commission which subsequently became the Federal Energy Regulatory Commission (FERC). Over the objection of WWP, the Tribe pursued the matter to its conclusion before the FERC. Full and fair and complete hearings were held at which time all parties had an opportunity to present all evidence. The United States Court of Appeals held against the Tribe and against the FERC, which is an agency of the United States, and held that WWP does own and possess all rights, title, and interests necessary for the construction, operation and maintenance of the Little Falls Hydroelectric Development. Id. at 336. Such determination was made by the United States Court of Appeals after considering the full and entire record which had been made with the presentation of evidence

and arguments by the United States FERC staff, the United States Department of the Interior through its attorney on behalf of the Spokane Tribe of Indians, and the Spokane Tribe of Indians, through its own attorney, Robert D. Dellwo. The interests of the FERC and the Tribe on the issue of the rights, title and interests of WWP were the same. Both were attempting to establish that WWP did not own the rights, title and interests claimed by WWP. Attorneys for the FERC and attorneys for the Tribe filed briefs and presented oral argument before the United States Court of Appeals. The determination therein was adverse to the Tribe. The Tribe now wishes to relitigate the same issues presented to and decided by the United States Court of Appeals for the D.C. Circuit.

The purpose of the doctrine of res judicata is to avoid multiple lawsuits

and conserve judicial resources. Such purpose is served in this case by the application of the doctrine of res judicata to bar relitigation by the Tribe of the issues previously decided with respect to WWP's rights.

IV. THE CLAIMS OF THE TRIBE ARE BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

This action brought by the Tribe is barred by the application of the doctrine of collateral estoppel. Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979); Montana v. United States, supra, at 153. In this case, it would be grossly unfair for the Tribe to

force WWP to the additional expense of defending itself against the same claim raised by the Tribe before the Federal Power Commission and then the Federal Energy Regulatory Commission, which issues were ultimately decided by the United States Court of Appeals in the District of Columbia. The Tribe elected the forum in which to present its claims. (See Affidavit of J.K. Boyd dated October 6, 1989.) WWP argued that FERC had no jurisdiction. The Tribe insisted on going forward and requested FERC to make a determination. FERC made such a determination; however, based upon the record before the FERC, the United States Court of Appeals determined that the decision of the FERC was clearly erroneous and reversed the FERC and confirmed WWP's claim that it has all right, title and interest necessary for the construction, operation and

maintenance of the Little Falls Hydroelectric Development, and that WWP acquired those rights from the United States prior to 1920. WWP v. FERC, supra. The Tribe apparently desires a different result in this proceeding. However, having initiated the other proceeding and having pursued such proceeding over the opposition of WWP, it would be grossly unfair and improper for the Tribe to now be able to ignore the effect and result from the other proceeding and pursue this proceeding.

The argument may be made that the proceeding before the FERC was an administrative proceeding and that the review before the United States Court of Appeals in the District of Columbia was the review of an administrative proceeding. Regardless, the Tribe elected to pursue the administrative proceeding over the objection of WWP. Furthermore,

it cannot be doubted that the United States Court of Appeals for the District of Columbia was competent to determine the legal issues concerning the effect of an Act of Congress and the actions of the Secretary of the Interior with respect to an Act of Congress and the rights, title and interests acquired by WWP pursuant to such Act of Congress. The fact that the matter went to the United States Court of Appeals for the District of Columbia is the result of the choice made by the Tribe to pursue the matter with the Federal Power Commission and the Federal Energy Regulatory Commission. See 16 U.S.C.A. § 8261(b), which provides for the review of decisions of the Federal Energy Regulatory Commission.

This Court has long supported the application of the doctrines of res judicata and collateral estoppel to bar multiple litigation of the same issues by

the same parties and piecemeal litigation. See Hatch v. Reliance Insurance Co., 758 F.2d 409 (9th Cir. 1985) and Americana Fabrics, Inc. v. L & L Textiles, Inc., 754 F.2d 1524 (9th Cir. 1985).

V. THE CLAIM OF THE TRIBE IS BARRED BY THE APPLICATION OF THE DOCTRINE OF EQUITABLE ESTOPPEL OR ESTOPPEL BY DEED.

The issue concerning the effect of the Act of March 3, 1905, has now been determined twice, once by the United States Court of Appeals in WWP v. FERC, supra, and in United States v. Big Bend Transit Co., 42 F.Supp. 459 (E.D.Wash. 1941). As in United States v. Big Bend Transit Co., as shown by the facts before the Court, Congress passed the Act of March 3, 1905, for the purpose of authorizing the construction of hydroelectric projects on the Spokane River. David Wilson and WWP applied for

the lands and rights necessary for the construction, operation and maintenance of the Little Falls Hydroelectric Project. The Secretary of the Interior approved such applications and granted all of the lands and rights necessary for the construction of the Little Falls Hydroelectric Project, which rights were all acquired by WWP. WWP relied on such rights and expended more than $1.5 million prior to 1922 to construct the Little Falls Hydroelectric Development. David Wilson and WWP paid all monies due and payable under the 1905 Act. Finally, in 1924, a formal document in the form of a patent was issued to WWP. WWP has continued to operate and maintain the Little Falls Hydroelectric Development since its completion in 1911. It is clear, under the holding of United States v. Big Bend Transit Co., that the United States would be barred from challenging

the grants made under the 1905 Act. Since the Tribe derives whatever compensatory rights it may have from the United States (United States v. Aam, supra), the Tribe is also equitably estopped from challenging the grants made by the United States. In order to continue its claim for compensation, the Tribe must show that it has a compensable interest in the land which the Tribe claims. There is no evidence that Congress ever authorized any recognition or grant to the Tribe of any interest in the Spokane River.

VI . THE TRIBE'S CLAIM IS BARRED BY THE APPLICATION OF THE DOCTRINE OF LACHES.

The Tribe is apparently making a claim for property and a claim for damages based on alleged interference with a purported fishery at Little Falls in the Spokane River. With respect to the claim for property, WWP contends that the doctrine of laches should be applied to

bar such claim by the Tribe. The United States granted David Wilson and WWP the rights which WWP now owns. The Tribe has waited more than seventy years to bring this action. The facts that allegedly gave rise to this action occurred almost eighty years ago. There is no one living who has personal knowledge concerning the facts that existed at that time. The construction of the Little Falls Hydroelectric Development occurred with the expenditure of more than $1.5 million from 1908 to 1911. Such construction was obvious to all to see. If there had been any claim of any defect in title or any other claim made at that time, such matter could have easily been handled and any defect could have been corrected. It further appears that the Tribe inquired concerning the construction of the project and it also further appears that the Secretary of the Interior advised the

Tribe concerning the rights acquired by David Wilson and WWP. See Dellwo Affidavit, Exhibit No. 48. Yet, during all this time, the Tribe sat on its claim with the exception of the pursuit of a claim made before the Federal Power Commission and later before the Federal Energy Regulatory Commission starting in 1971.

There is some doubt that the doctrine of laches may be applied to a claim of the Tribe to property. County of Oneida v. Oneida Indian Nation of New York State, 470 U.S. 226, 244-45, 105 S.Ct. 1245, 34 L.Ed.2d 169 (1985). However, close scrutiny of the Oneida case shows that the Court did not rule on the application of the doctrine of laches since the issue was not raised before the Court of Appeals. However, it should be noted that four justices, in their dissent, concluded that the doctrine of

laches should have been applied. Id. at 256 and 261. Therefore, there is a very good argument that the doctrine of laches should be applied to a stale claim made with respect to property rights, particularly, as here, there are no witnesses who can describe from personal knowledge the facts.

Despite any claim based on Oneida that the doctrine of laches cannot bar a property claim by Indians (which the undersigned does not believe to be the holding of Oneida), the doctrine of laches should at least be applied to bar any claim which the Tribe now makes with respect to any alleged damages to a fishery. Again, because the Indians have sat on their rights, all witnesses who may have known the facts from personal knowledge concerning any alleged fishery at Little Falls on the Spokane River are long since deceased. Furthermore, there

is little or no documentary evidence concerning such a possible fishery. There is no way for WWP to defend against such a claim due to the passage of time and the unavailability of persons with personal knowledge concerning such facts. This is precisely the situation where the doctrine of laches should be applied to prohibit unfair prejudice to a person because a possible claimant sits on its rights. It should be noted that in 1942 the Tribe was inquiring concerning the rights acquired by WWP for the Little Falls Hydroelectric Development. Furthermore, it should be noted that the Tribe hired attorneys to make claims against the United States under the Indians Claims Commission Act, which claims had to be filed by 1951. See the Petition before the Indian Claims Commission filed by the Tribe, attached to the Affidavit of Jerry R. Boyd. Again,

this is precisely the type of case where the doctrine of laches should be applied. See the dissent in County of Oneida v. Oneida Indian Nation of New York State, 470 U.S. 226, commencing at 255.

CONCLUSION

The claims of the Tribe in this matter are barred by two statutes of limitations and the application of the doctrines of res judicata, collateral estoppel, equitable estoppel or estoppel by deed, and laches.

RESPECTFULLY SUBMITTED this 6th day of October, 1989.

PAINE, HAMBLEN, COFFIN, BROOKE & MILLER

By_____

Jerry K. Boyd
Attorneys for WWP
WSBA #2099

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1200 Washington Trust Financial Center
Spokane, Washington 99204
Telephone (509) 455-6000

Attorneys for The Defendant, The
Washington Water Power Company

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS,	)	No. C-82-753-AAM
Plaintiff,	)	WWP'S LR 56 STATEMENT OF FACTS IN REPLY
v.	)	
STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY,	)	
Defendants.	)	

The Washington Water Power Company (WWP) submits the following statement of facts pursuant to LR 56 in reply to the response submitted by the Tribe to WWP's Motion for Summary Judgment of Dismissal based on the statute of limitations, res

judicata, collateral estoppel, and laches. 1. The previous statements of fact, filed by WWP, pursuant to LR 56 are by this reference made a part hereof as though set out in full.

2. The Tribe instigated the proceeding before the Federal Power Commission and later the Federal Energy Regulatory Commission (FERC) and continued to pursue the proceeding before the FERC. (See the filings of the Tribe in the form of the Petition to Intervene and the Memorandum filed by the Tribe before the FPC and the FERC which are attached to the Affidavits of Jerry K. Boyd (JKB).

3. In the proceedings before the FPC and the FERC, the Tribe contended that WWP did not have all of the rights, title and interests necessary for the construction, operation and maintenance

of the Little Falls Hydroelectric Development. (Id.)

4. In the proceedings before the FERC, the Tribe urged the FERC to rule and the FERC ruled that the FERC had the necessary authority and jurisdiction to determine the rights, title and interests held by WWP with respect to the Little Falls Hydroelectric Development. See the copy of the Order of the Presiding Administrative Law Judge dated March 22, 1978; see the Memorandum of Law filed by the Tribe in response to the March 22, 1978, Order of the Presiding ALJ; and see the Order of the ALJ dated June 1, 1978, where the ALJ ruled that the FERC has jurisdiction to determine whether or not WWP has all of the rights necessary for the construction, operation and maintenance of the Little Falls Hydroelectric Development. Indeed, the FERC and the Tribe took the same position

that WWP did not have all of such rights in their briefs filed with the United States Court of Appeals for the District of Columbia. (Brief of the FERC dated April 11, 1984, at pages 10 and 11 (which is attached to the Affidavit of Jerry K. Boyd dated October 25, 1989), and the Brief of the Spokane Tribe of Indians dated April 25, 1984, at pages 1 and 2 where the Tribe adopted the arguments made by the FERC in its Brief.)

5. Finally, by a decision, which is now published at 775 Fed.2d 305 (D.C. Cir. 1985), the United States Court of Appeals for the District of Columbia considered the decision of the FERC and the arguments made by the FERC and the Tribe whereby the rights of WWP with respect to the Little Falls Development were considered, construed, and determined, and wherein the Court reversed the FERC and made a

determination, as a matter of law, based on the record (which is substantially the same record as is now before this Court) that WWP does hold all of the rights, title and interest necessary for the construction, operation and maintenance of the Little Falls Hydroelectric Development. (A copy of the Opinion of the United States Court of Appeals for the District of Columbia is attached to the JKB Affidavit dated October 26, 1989. A copy of the Decision of the Court on the Petition for Rehearing and the Suggestion for Rehearing En Banc was denied by the Court is attached to said copy of the Opinion.)

DATED this 26th day of October, 1989.

PAINE, HAMBLEN, COFFIN, BROOKE & MILLER

By_____
Jerry K. Boyd
Attorneys for The Washington Water Power Company

BEFORE THE FEDERAL POWER COMMISSION
WASHINGTON, D.C.

In the Matter of the	)	Docket IT-5501
APPLICATION FOR LICENSE OF THE WASHINGTON WATER POWER COMPANY	)	Project 2545 Little Falls Dam

PETITION IN INTERVENTION

The SPOKANE TRIBE OF INDIANS of the State of Washington, by and through the undersigned, petition:

1. The Spokane Tribe of Indians is a legally constituted tribe, recognized by the Department of the Interior and the United States Government as an Indian tribe headquartered on the Spokane Indian Reservation. The tribe and reservation are instrumentalities of the Federal

Copy of above Petition in Intervention received this 5th day of February, 1971

Attorney for Washington Water

Government. The reservation was established by Executive Order of President Rutherford B. Hayes on January 18, 1881.

2. Said executive order established the boundaries of the reservation. In so far as they are relevant to this petition, the order established the Northeast corner of the reservation as the point where "Chemakane Creek crosses the 48th parallel of latitude, thence down the east bank of said creek to where it enters the Spokane River; thence across said Spokane River westwardly along the southern bank thereof to a point where it enters the Columbia river" etc. . .

3. The Spokane Tribe has heretofore filed its Resolution 1970-43 with the Federal Power Commission, advising that Commission of its interest in this application and authorizing its

undersigned attorney to appear for the tribe in this matter.

4. The application of the Washington Water Power Company and subsequent communications document the history of the alleged taking of the dam site, the flooded lands and the water rights, which history is by this reference made a part of this petition, as are the documents submitted by the Washington Water Power, to document it. In essence, the background cited by the Washington Water Power Company and the legal documents furnished by the Company sought to establish that allegedly by the 1905 Statute, which they cite and on which they rely, the Washington Water Power Company and its predecessor filed on and took the dam and power site known as Little Falls, the channel of the river behind Little Falls and the north bank of the River which was to be flooded,

without any compensation whatever to the Spokane Tribe of Indians save $701.87 paid to the tribe allegedly for the tribal acreages above the river's high water mark which Little Falls flooded.

5. The application for power licenses in which this petition in intervention is filed is an application for licenses to four dams in a series of six dams. It excludes the first dam in the series, Post Falls Dam, and the last day in the series, Little Falls Dam. Petitioner contends that said application, in so far as it excludes said dams, is deficient.

6. Little Falls Dam site and the dam itself and most of the lake behind it is within the southern and eastern boundaries of the Spokane Indian Reservation. Except for the flooded lands on the west bank and tail waters to the east of the confluence of Chemakane Creek

and the Spokane River all of the dam, its various power facilities, spillways, power house, etc., and all of the waters behind the dam are within the Indian reservation.

7. Petitioner claims a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statutes under which these proceedings are brought. Such right or interest is based on rights conferred by statutes of the United States; an interest which may be directly affected and which is not adequately represented by existing parties and as to which petitioner may be bound by the Commission's action in the proceeding and that said acts will detrimentally affect petitioner's rights herein or other interests of such nature that petitioner's participation may be in the public interest.

8. Other than said $701.87 which is the total amount the Spokane Tribe received for the alleged taking of the flooded lands, the tribe has never received any compensation for the use by the Washington Water Power Company of the dam site, the flooded lands, the river channel, which were and are still owned by the tribe or the waters of the river to which the tribe has valuable rights. It has received no damages or other compensation for the fact that the building of the Dam in 1908 forever destroyed Little Falls as a recreational, salmon fishing resource of the tribe.

9. The tribe has already filed herein its statement that after the building of Little Falls Dam the four other intermediate dams were built by the Washington Water Power between Post Falls Dam and Little Falls Dam. Long Lake Dam, just above Little Falls, created a large

lake 25 miles long. Ever since the building of Long Lake Dam the long, stagnant lake behind it has existed as a "sewage lagoon" for upstream polluters, primarily the City of Spokane. As outlined in the statements of the tribe and of the State of Washington on file herein dams of the Washington Water Power Company, the subject of this file and application, by holding and accumulating the upstream sewage and other effluents, has created, in addition to the basic pollution and contamination, a constant and permanent drop in the oxygen content of the waters, an increase in their temperature and in such things as algae bloom and other conditions which has resulted in the further destruction of the Spokane River waters where they form the southern boundary of the Spokane Reservation as a fishing, recreational resource. The fish die off has been

almost total. Thus the Spokane Tribe has, in addition to receiving no compensation for Little Falls Dam site, suffered irreparable loss in the value of these waters as a fishing, recreational resource and in the value of the abutting tribal and allotted lands as river and lake front property.

10. By reason of all of the foregoing factors, separately and in combination, the financial, esthetic, recreational and ecological loss of the Spokane Tribe because of the building of Little Falls Dam on the tribally owned damsite and the later building and operation of the upriver dams would, if valued and appraised in money, be astronomical and in fact irreparable and perpetual.

11. The Washington Water Power application, as aforesaid, claims that the Federal Power Commission has no

jurisdiction over either Little Falls Dam or Post Falls Dam by reason of the method of taking of these two dam sites and related areas and backwaters. In essence, its contention must be that without any compensation to the tribes involved or the United States Government it somehow received permanent, indefeasible title to the sites and land involved which it claims to hold in perpetuity without any past, present or future obligation to or jurisdiction by the tribes or the United States Government with regards to compensation, damages, regulation or operation. Additionally, the Washington Water Power Company contends that because it had this claimed title and rights to the sites before 1920, the effective date of the Federal Power Act, the Federal Power Commission does not have and will not acquire any jurisdiction over these two dams and that the Federal Power

Commission has jurisdiction over only the middle four dams of the six-dam series.

12. The Spokane Tribe alleges that the Federal Power Commission and the United States Government does have jurisdiction to license and relicense Little Falls Dam and that petitioner should be authorized to intervene in the Commission's consideration of the licensing of Little Falls Dam so that it can place before the Commission the consideration and determination of the Tribe's legal and equitable rights with regard thereto. The tribe bases its legal position as aforesaid on the following:

a. Little Falls Dam is an integral part of a project system and the Federal Power Commission having jurisdiction over four dams in the system has jurisdiction over the entire system, including Little Falls Dam.

The six-dam Spokane River system is a single integrated system or project fully coordinated and interrelated. It begins with Post Falls dam and the storage of at least one-half million acre feet of water on Coeur d'Alene Lake. There follows a sequence of impoundments and releases of water in the intervening dams, the existence of the long storage dam of Long Lake (25 miles long) and final use of these waters on peak of the day and peak of the season releases and impoundments, with the last dam of the series--Little Falls, which in effect is a regulating dam--benefiting most from the releases and impoundments of the upriver dams. The turbines at Little Falls might as well be a part of the turbines at Long Lake or at any of the upriver dams. It is only in combination with the upriver dams that Little Falls takes on its principal value--that of

being a peaking facility to be operated in close coordination with Long Lake and other dams upstream. The system might as well be one large eight hundred foot dam utilizing the entire fall of this 50-mile stretch of the Spokane River. In fact, the coordinated use of the six dams achieves a greater efficiency than if it were a single dam as a crest or a depression in the flow is allowed to move downstream through each dam in sequence meeting the hourly demands for energy of the City of Spokane and the adjacent area. Even the Washington Water Power Company refers in its applications to the plan system or the project system, using the word system in the singular rather than separately. In fact, this "system" is heralded all over the United States as one of the most efficient, integrated systems in existence.

b. Little Falls Dam separately and in combination with the other Dams of the six-dam system affects the navigability of the Columbia River and of the Spokane River itself.

The Washington Water Power Company itself, in its letter in this file dated December 31, 1962, included an exhibit (#21) quoting Public Notice P-57-58 by the Army Corps of Engineers, dated June 13, 1957, as follows:

> "Spokane River--This river enters Franklin Roosevelt Lake about five miles northerly of Peach, Washington, and is considered by the Corps of Engineers as being navigable to Little Falls, a distance of about thirty miles."

The Spokane River has an obvious effect on the navigability of the Columbia River and in fact the entire Spokane River System is navigable. The manipulation of water discharged through the Washington Water Power dams so affects the Columbia

river that the Company was required to join in singing the Pacific Northwest Coordination Agreement. Under the terms of this agreement, all water power users significantly affecting the storage capacity of dams along the Columbia River are required to regulate the water flow of their projects in order to assure maximum utilization of the water resources of the Columbia River. The Washington Water Power signed this agreement, recognizing the effect of its six-dam system on the federally regulated navigable Columbia and lower Spokane River. It agreed to control and release its storage waters in such a manner that all Columbia River users downstream to the Pacific Ocean would not be adversely affected. The Federal Power Commission has long recognized its powers to assert jurisdiction over projects lying on presumably nonnavigable waters which

significantly affect a navigable watercourse.

c. Little Falls Dam, in conjunction with the other five dams, is part of an integrated transmission system with close coordination of the power output and transmission among and between the six-dam system and with the Northwest power pool.

Not only are the generating facilities of the six dams on the Spokane River system integrated and operated in concert through coordinating releases and impoundments of upstream waters, but the transmission facilities of this system are similarly integrated so that they operate as a single system. After the commingling of the power output of the six dams, the combined, integrated output is fed into the entire facilities of the Washington Water Power Company and into the Northwest power pool, transmitted

back and forth across state lines, completely losing its identity.

The operation of Little Falls as part of the six-dam plant system, in conjunction with the other Washington Water Power facilities and in close coordination with the entire Northwest power pool contributes immeasurably to its value as a single power producer. Its low water flow is firmed up and made more responsible to daily and seasonal needs and such seasonal variations as exist with low water and high water are counteracted by the integrations of the dam into the entire system and the Northwest power pool.

d. Little Falls Dam and its operation vitally affects Federal Reserve lands, namely, the Spokane Indian Reservation.

Because Little Falls Dam rests on tribal lands and its backwaters overflow

tribal lands, it is subject to 15 USCA 803c which provides for the fixing of a reasonable annual charge for the use of such lands. The tribe has received no compensation whatever for its loss of a prime fishing site and for the use of its lands and waters. In such instances, the Federal Power Commission can act as a forum to provide jurisdiction and to issue orders to protect the rights of the federal government and its wards, the Indians, in any dams over which it has jurisdiction.

Conversely, the existence of this obligation re Indian tribes and Federal Reserve lands implies and creates the jurisdiction needed to act as a forum for such purposes.

e. Little Falls Dam has been substantially modified so as to require its present licensing by the Federal Power Commission.

Since the enactment of the Federal Power Act, Little Falls Dam has been substantially modified, increasing its height, the head of the waters, the flooding of Indian land and its generating capacity. Its effective generating capacity has been substantially increased not only by these structural changes but by the firming up and regulation of the water flow by the five upstream dams and by its integration with the rest of the system and the Northwest power pool.

The SPOKANE TRIBE OF INDIANS, petitioner herein, therefore prays:

1. That the Federal Power Commission authorize the Spokane Tribe to intervene as a party in the application of the Washington Water Power Company.

2. That the Federal Power Commission require the licensing of Little Falls Dam as a condition of its

continued operation by the Washington Water Power Company.

3. That the Commission assume jurisdiction as a judicial forum to litigate and decide the rights of the Spokane Tribe with regard to the past, present and future operation of Little Falls Dam and that it award the tribe damages and compensation for the initial taking of the site the dam occupies and its past and future operation as a power dam.

4. That the Commission by its orders provide for the eventual extinguishment of all the rights the Washington Water Power Company may have to Little Falls Dam site and the reversion of those rights to the Spokane Tribe of Indians.

5. That the Commission grant such other relief as is proper in the premises.

SPOKANE TRIBE OF INDIANS

by DELLWO, RUDOLF & GRANT

Attorneys for Spokane Tribe of Indians
1016 Old National Bank Building
Spokane, Washington 99201

STATE OF WASHINGTON)
: ss
County of Spokane)

ROBERT D. DELLWO, being first duly sworn, states that he is of counsel for Petitioner, the Spokane Tribe of Indians, in the foregoing Petition for Intervention; that he has read said Petition and knows the contents thereof; and that all of the statements contained therein are true and correct to the best of his knowledge and belief.

_____

Sworn to and subscribed before me, a notary public, in and for said county and State, this 5th day of February, 1971.

_____
Notary Public
My commission expires _____

PATENT RECORD
STEVENS COUNTY, WASHINGTON

-87040-

5963
Noted VGS 9/5/24
9/18/24
Noted-Miller
9/16/24
Noted NAV

WHEREAS, The Act of Congress approved March 3, 1905, (33 Stat., 1006), provided as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right to the use of the waters of the Spokane River where the said river forms the southern boundary of the Spokane Indian Reservation may, with the consent of the Secretary of the Interior, be acquired by any citizen, association, or corporation of the United States appropriation under and pursuant to the laws of the State of Washington.

"Sec. 2. That the Secretary of the Interior by, and [he] hereby is, authorized and empowered to grant such appropriator or appropriators land on said reservation, whether the same has been allotted in severalty to any individual Indians, but which has not been conveyed to the allottee with full power of alienation, or whether the same remains unallotted, on the north bank of the said Spokane River, such as shall be necessary and requisite for overflow rights and for the erection of suitable water, electrical or power plants, dams, wing walls, flumes, or other needful structures required for the development of power or for the beneficial use of said water:

Provided, that no lands shall be granted under this Act until after the Secretary of the Interior is satisfied that the person, association, or company applying

has made said application in good faith and with intent and ability to use said lands for the purpose above specified and that it requires the quantity of land applied for in such use, and in case of objection to the grant of said land shall be made, the said Secretary shall afford the parties so objecting a full opportunity to be heard.

"Sec. 3. That the compensation to be paid for said land by said applicants shall be determined in manner prescribed in Section three of the Act of March second, eighteen hundred and ninety nine, entitled 'An Act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands and Indian allotments, and for other purposes.'

"Sec. 4. That if the land allotted in severalty to any individual Indian which has not been conveyed to the

allottee with full power of alienation be granted to any such appropriator, the Secretary of the Interior is empowered to use the moneys received for such land so allotted in the purchase of other suitable lands for such allottee.

"Sec. 5. That the Secretary of the Interior shall make all needful rules and regulations not inconsistent herewith for the proper execution and carrying into effect of this Act."

AND WHEREAS, On November 3, 1906, the Secretary of the Interior approved the amended application of David Wilson for a power site and water rights on the Spokane River, pursuant to the provisions of said act of March 3, 1905, and at the same time approved a map showing the lands on the north bank of the said river considered necessary and requisite for overflow rights.

AND WHEREAS, On July 6, 1907, David Wilson assigned to the Washington Water Power Company the rights acquired by him under the approval of the Secretary of the Interior referred to above, and the said assignment was approved and recognized by the Secretary of the Interior:

AND WHEREAS, The said Washington Water Power Company applied for a power site and water rights on the Spokane River pursuant to the provisions of the said act of March 3, 1905, affecting a tract of land adjoining the land affected by the approved application of the said David Wilson, which application of the said Washington Water Power Company was approved by the Secretary of the Interior on August 29, 1908.

AND WHEREAS, The Secretary of the Interior has heretofore given his consent to acquisition by the said David Wilson

and the said Washington Water Power Company of the right to the use of the waters of the Spokane River for power purposes under and pursuant to the laws of the State of Washington, where the said river forms the southern boundary of the Spokane Indian Reservation as provided in Section One (1) of the said act of March 3, 1905:

AND WHEREAS, The said David Wilson and the said Washington Water Power Company have made full payment of the compensation found by the Secretary of the Interior to have been lawfully due in connection with both the allotted and tribal lands involved, as provided in Section Three (3) of the said act of March 3, 1905:

AND WHEREAS, Pursuant to instructions approved by the Secretary of the Interior, the land on the north bank of the said Spokane River affected by the

said approved application of David Wilson and the Washington Water Power Company have been surveyed by a United States cadastral engineer, and the supplemental plats (in two sheets) which were prepared from the field notes of the survey, were approved by the United States Surveyor General for the State of Washington on February 9, 1914, and were accepted by the Commissioner of the General Land Office on March 3, 1924:

AND WHEREAS, The lands on the north bank of the said Spokane River affected by the said applications of David Wilson and the Washington Water Power Company are segregated on the said supplemental plats of survey as Tract No. 37, in Sections 10, 11, 15, 16, 17 and 20, of Township 27 North of Range 39 East of the Willamette Meridian, Washington:

AND WHEREAS, It appears from the records of the Department of the Interior

that the said David Wilson and the said Washington Water Power Company made said applications in good faith and with intent and ability to use said Tract No. 37 for the purposes specified in said act of March 3, 1905 and that the Washington Water Power Company requires the quantity of land applied for in such use:

AND WHEREAS, The said David Wilson and the said Washington Water Power Company have complied with all the rules and regulations promulgated by the Secretary of the Interior under the said act of March 3, 1905, and with all the provisions of said act:

THEREFORE, I, Hubert Work, Secretary of the Interior, as authorized and empowered by Section Two(2) of the said act of March 3, 1905, hereby grant unto the Washington Water Power Company the following described land, to the extent

and for the purposes that the Secretary of the interior is authorized to grant the same under the said act of March 3, 1905, to wit: Tract 37, in Section 10, 11, 15, 16, 17 and 20 of Township 27 North of Range 39 East of the Willamette Meridian, State of Washington, as described upon the said official plat of survey (in two sheets) hereinbefore recited, which plats of survey for the purposes of description are attached hereto and made a part hereof.

IN WITNESS WHEREOF, I have signed this instrument this 2nd day of July, 1924, and caused the seal of the Department of the Interior to be affixed hereto.

Seal: Department of the Interior.

Hubert Work,
Secretary of the Interior.

Witnesses to signature:

E.E. Burlow
M.R. Brock

[MAPS OMITTED]

A C K N O W L E D G M E N T

District of Columbia)
)SS
City of Washington)

I, W. Bertrand Acker, Notary Public in and for the City of Washington, District of Columbia, do hereby certify that on this 15th day of July, 1924, personally appeared before me Hubert Work, the Secretary of the Interior, to me known to be the party described in, and who executed the attached instrument under date of July 2, 1924, in his official capacity of Secretary of the Interior.

Seal: W. Bertrand Acker, Notary Public, District of Columbia.

W. Bertrand Acker,
Notary Public in and for the City of Washington, District of Columbia.

My commission expires December 16, 1925.

Filed for record at the request of The Washington Water Power Company, Spokane, Washington, October 24th, 1924, at 2:19

o'clock P.M., and recorded October 25, 1924.

_____/s/_____, Deputy. DOROTHY LEXTER, COUNTY AUDITOR.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

The Washington Water Power Company) Project No. 2545

ORDER CALLING FOR THE FILING OF MEMORANDA

(March 22, 1978)

The Commission's hearing order of July 20, 1977 identified four questions which need to be resolved in this case to determine whether the agency has licensing jurisdiction over The Washington Water Power Company's two other hydroelectric developments--Post Falls and Little Falls--located on the Spokane River.*

In a recent status report submitted to the Presiding Judge, the Company takes the position that the Commission lacks the power to inquire into the first of these questions--"Whether The Washington Water Power Company posses a permit or valid existing right-of-way granted prior to

June 10, 1920 [pursuant to Section 23(b) of the Federal Power Act] for the continued operation and maintenance of the Little Falls and Post Falls developments?"

On or before April 12, 1978, each party to this proceeding--including the Company--shall file with the President Judge a memorandum containing supporting points and authorities addressing the issue raised by the Company. Each memorandum shall also address a second point raised by the Company in its status report--that even if the Commission has the power to inquire into the first of the questions presented in its hearing order, the United States and the Spokane and Coeur d'Alene Tribes of Indians are estopped to deny the existence of the pre-1920 rights of the Company and are barred by the doctrine of laches to make any claim for money against the Company.

Raymond M. Zimmet
Presiding Administrative Law Judge

* By order issued August 17, 1972, the Commission granted a license to the Company covering four other hydroelectric developments on the Spokane River (Project No. 2545).

11 FERC ¶ 63,001

Washington Water Power Company, Project No. 2545

Presiding Administrative Law Judge's Initial Decision Determining Commission Jurisdiction Over Hydroelectric Development

(Issued April 1, 1980)

Michel Levant, Presiding Administrative Law Judge.

Appearances

Jerry K. Boyd, Alan P. O'Kelly, Lee S. Sherline and *Peyton G. Bowman, III,* on behalf of the Washington Water Power Company.

Robert D. Dellwo and *Gary T. Farrell* on behalf of the Coeur d'Alene and Spokane Indian Tribes.

Charles E. O'Connell, Jr., on behalf of the Secretary of the Interior.

Linda Lee and *Peter Lesch* on behalf of the Staff, Federal Energy Regulatory Commission.

To be determined in this proceeding is the Commission's jurisdiction to license the Washington Water Power Company's Little Falls development on the Spokane River in the State of Washington.

Procedural Background

On August 17, 1972, the Commission granted a license to the Washington Water Power Company (WWPC) for the continued operation and maintenance of Project No. 2545 located on the Spokane River in the State of Washington and which, as licensed, includes the Upper Falls, Monroe Street, Nine Mile, and Long Lake developments. *Washington Water Power Co.*, 48 FPC 339. The Commission reserved its ruling on jurisdiction over WWPC's Little Falls and Post Falls developments also located on the Spokane River.[1] The Commission set the matter for hearing by order issued July 20, 1977.

The Spokane Tribe of Indians (the Spokane Tribe) filed a late Petition for Intervention on February 5, 1971, which WWPC promptly moved to dismiss. The Spokane Tribe filed an amended petition on February 22, 1971, which the Commission

granted on April 12, 1971. On February 13, 1973, the Secretary of Interior (Secretary) filed a Petition for Intervention on behalf of both the Spokane Tribe and the Coeur d'Alene Tribe of Indians. By its answer, filed March 23, 1973, WWPC moved to dismiss this Petition for Intervention. The Commission granted the Secretary's Petition for Intervention by order issued on April 24, 1973. Another Petition for Intervention was filed on behalf of the Coeur d'Alene Tribe of Indians on June 28, 1973, and again, WWPC moved to dismiss this Petition by its answer filed July 10, 1973. The Commission permitted intervention by the Coeur d'Alene Tribe of Indians by order dated September 14, 1973.

On March 12, 1979, the parties jointly filed a settlement agreement concerning the Post Falls development wherein WWPC agreed to file an application

to include the Post Falls development (on Coeur d'Alene Lake) within the license for Project No. 2545.[2] The Commission approved the settlement agreement by order issued July 9, 1979, 8 FERC ¶ —.

On July 17 and 25, 1979, a hearing was held on the issue of Commission jurisdiction over the Little Falls development.[3] Initial briefs were filed by WWPC, the Spokane Tribe, the Secretary and the Commission Staff on September 24, 1979. Reply briefs were filed by these parties on October 22, 1979.

The Issues

In its order of July 20, 1977, the Commission stated that a determination of jurisdiction involved the following issues:

(1) Whether the Washington Water Power Company possesses a permit or valid existing right-of-way granted prior to June 10, 1920, for the continued operation

and maintenance of the Little Falls and Post Falls development?

(2) Whether the Washington Water Power Company has modified the original works such that it exceeded the authority contained in the original grants for Post Falls and Little Falls developments, thereby subjecting those developments to licensing, according to the holding in *Northwest Paper Co. v. F.P.C.*, 344 F.2d 47 (CA8—1965)

(3) Whether operation of the Post Falls or Little Falls developments affects United States lands outside of the area covered by the permits claimed by The Washington Water Power Company?

(4) Whether the Post Falls and Little Falls developments, operated in coordination with Project No. 2545, constitute a part of that project and must be licensed as such, regardless of the

existence of a pre-June 10, 1920, permit or valid right-of-way?[4]

Since no party contends that there has been significant modification of the Little Falls development or that the Little Falls development occupies lands of the United States outside the area covered by the permits claimed by WWPC, issues two and three are rendered moot. Staff, the Spokane Tribe, and the Secretary, all of whom support the exercise of Commission jurisdiction over the Little Falls development, present their respective positions on issues one, four and on the issue of whether the Spokane River is a navigable water of the United States.

Counsel for the Spokane Tribe argues on brief that certain actions of the Secretary during the period of 1905 through 1924 were invalid and questions WWPC's title to the Indian reservation lands, where the Little Falls development

is situated. It is further suggested that the site was acquired without just compensation or due process of law. The resolution of these questions is beyond the scope of this proceeding. The Presiding Judge has already ruled that the appropriateness of the actions taken by the Department of the Interior or the Secretary would not be determined in this proceeding.[5] These actions will, however, be considered on their face in determining whether WWPC received a permit or valid existing right-of-way prior to June 10, 1920, in accordance with the provisions of Section 23(b) of the Federal Power Act.[6]

Decision on the issue of Commission licensing jurisdiction will thus be focused on determination of the threshold issue of whether WWPC possessed a valid permit or right-of-way prior to June 10, 1920. The decision will not address questions of land titles, water rights,

compensation, or Spokane Tribal rights, since these are clearly extraneous to a determination of the threshold jurisdictional issue. Upon a determination that WWPC does not have a valid pre-1920 permit, examination of the bases for exercise of Commission jurisdiction under the Federal Power Act, such as the navigability of the Spokane River and the hydraulic and electrical coordination of the Little Falls development with other developments, would then be in order.

Discussion

Pre-1920 Permit

Staff, the Spokane Tribe, and the Secretary contend that WWPC does not possess a valid pre-1920 permit. WWPC maintains that it does on the basis of a series of events which culminated in the issuance by the Secretary of a specific authorization, dated July 2, 1924.[7] WWPC claims authorization pursuant to an Act of

Congress, dated March 3, 1905 (Act of 1905),[8] which authorized, subject to the Secretary's consent, acquisition of the right to use the waters of the Spokane River. The 1905 Act also empowered the Secretary to grant lands "necessary and requisite for overflow rights and for the erection of suitable water, electrical or power plants, dams, wingwalls, flumes, or other needful structures required for the development of power or for the beneficial use of said water" along the Spokane River on the south boundary of the Spokane Indian reservation to appropriators under and pursuant to the laws of the State of Washington.[9] Before the Secretary could make such a grant, however, he was to be "satisfied that the person, association, or company applying has made said application in good faith and with intent and ability to use said lands for the purposes above specified and that it

required the quantity of lands applied for in such use. . . ."[10] In addition, the applicant was required to make compensation to the United States in the manner provided in an 1899 Act for acquiring rights of way by railroad companies through Indians reservations, lands, and Indian allotments."

The events which preceded the July 2, 1924 grant by the Secretary, are embodied in a series of exhibits consisting essentially of correspondence and documents by David Wilson, WWPC, the Secretary, the Commissioner of Indian Affairs and other lesser officials of the Department of Interior and the Bureau of Indiana Affairs. Most of these exhibits speak for themselves and are not in dispute. They establish that on May 4, 1906, David Wilson received authorization from the Secretary to acquire about 200 acres of Spokane Indian Reservation land

and the right to use the waters of the Spokane River for water power, under the Act of 1905.[12] An amended application by David Wilson, for additional lands was approved by the Secretary on November 3, 1906.[13] A chronology of the principal events which followed is set forth below.

Some six weeks after David Wilson received his grant from the Secretary, he contracted to convey to WWPC his interest in the Spokane Indian Reservation lands for $25,000 and his interest in certain water rights for $100,000.[14]

On June 13, 1907, David Wilson applied to the State of Washington for Spokane River water rights, asserting that it was his intention to erect a dam on the site for the purpose of generating electricity and for other purposes.[15]

On July 8, 1907, David Wilson conveyed in two instruments his land and water interests in the power site to

WWPC.[16] Thereafter, WWPC filed a petition with the Secretary on May 18, 1908, requesting a grant under the Act of 1905 for an additional eight acre parcel within the Spokane Indian reservation, adjacent to the Wilson grant, and related water rights.[17] In that petition WWPC acknowledged its acquisition of the Wilson power site, but did not request the Secretary to take any action with respect to the Wilson conveyance. WWPC received approval of its application for the eight acre parcel on August 29, 1908.[18]

On December 15, 1908, David Wilson conveyed certain additional water rights to WWPC for $1,000.[19]

Construction of the Little Falls development, which is comprised of a dam, two tainter gates, spillway, wingwalls, and a powerhouse with four water turbines,[20] commenced sometime in the fall of 1908 and was completed, with power

generation from the fourth unit, sometime in 1911.[21]

In a letter to the Assistant Commissioner of Indian Affairs, dated May 5, 1909, WWPC suggested the possibility of acquiring additional Spokane Indian reservation lands under the Act of 1905, for the purpose of developing another power plant, and inquired about compensation for such lands as well as the character of the grant which the Secretary would issue.[22] On May 8, 1909, the Secretary responded that compensation would be determined according to the Act of March 2, 1899, and that the title granted under the Act of 1905 would be a full and permanent title, revocable only for non-use.[23]

On July 6, 1909, WWPC submitted a resurvey of the Wilson grant to the Secretary, requesting that the grant be amended accordingly.[24] In a letter, dated

May 26, 1910, WWPC was advised that the amendment of the Wilson grant to conform with the resurvey had been approved.[25]

A letter, dated September 27, 1913, from the General Land Office to the Commissioner of Indian Affairs notes discrepancies resulting from the amended grant, and also raises a question about the nature of the grant.[26] The letter is entitled "Application of David Wilson to acquire overflow rights in the Spokane Indian Reservation."

Some 10 years later, on April 30, 1923, the Assistant Secretary of Interior, in a communication to the General Land Office, approved the issuance of patents to WWPC for lands acquired from Wilson and for lands acquired by WWPC in its own right.[27] On May 10, 1923, however, the Secretary of Interior reversed the decision of the Assistant Secretary and denied patents to WWPC.[28] Thereafter, on

July 2, 1924, the Secretary tendered an instrument to WWPC which made the following grant:

> Therefore, I, Hubert Work, Secretary of the Interior, as authorized and empowered by Section Two (2) of the said act of March 3, 1905, hereby grant unto the Washington Water Power Company the following described land, to the extent and for the purposes that the Secretary of the Interior is authorized to grant the same under the said act of March 3, 1905, to wit: Tract 37, in Sections 10, 11, 15, 16, 17 and 20 of Township 27 North of Range 39 East of the Willamette Meridian, State of Washington, as described upon the said official plat of survey (in two sheets) hereinbefore recited, which plats of survey for the purposes of description are attached hereto and made a part hereof.[29]

A review of these events leads to the conclusion that prior to July 2, 1924, WWPC did not have an authorization from the Secretary granting it rights to the Wilson power site under the Act of 1905. This is obviously not the case with

respect to the eight acre parcel and related water rights for which WWPC made application and received approval from the Secretary. WWPC proceeds, however, on the theory that the actions of the Secretary in 1906, when a grant was made to David Wilson, in 1908, when WWPC received its grant for the adjacent eight acre site, and in 1910, when the original Wilson grant was amended pursuant to a resurvey, constitute a grant of its rights to the Wilson power site and that the 1924 instrument was "merely a final administrative act."[30] In support of this theory, WWPC maintains that the grant to David Wilson was not a personal grant to him and that since the Act of 1905 is silent as to transfers, David Wilson's conveyance of his rights to WWPC was sufficient to transfer the rights granted to Wilson by the Secretary.

Though the Act of 1905 is silent on the mechanics of transfer, WWPC concedes that in making a grant under that act the Secretary had to be satisfied "that the person, Association or Company applying has made said application in good faith and with intent and ability to use said lands for the purpose above specified and that it requires a quantity of land applied for in such use...."[31] From the plain meaning of that language, it is clear that the Secretary was required to pass upon the person, association or company that would acquire the "right to use to the waters of the Spokane River where the said river forms the southern boundary of the Spokane Indian reservation" and to use lands of the reservation for the purposes set forth in the Act. The Secretary passed upon David Wilson's application and approved the Wilson grant. The Secretary did not,

however, pass upon an application by WWPC for the Wilson power site, until 1923. The fact that the Secretary approved WWPC's application for an adjacent eight acre site does not establish Secretarial action on the transfer of the Wilson grant.

While specific requirements for the transfer of a grant are not established, it appears from the Secretary's November 3, 1906 letter granting David Wilson's amended application that the Department was rather strict in controlling the rights which it granted. This may be seen from the Secretary's instructions to the Commissioner of Indian Affairs:

> There is also granted to the said David Wilson, the right to use the waters of the Spokane River, as contemplated by said Act, subject to any prior, valid existing rights and adverse claims, with the understanding that he will execute and file with the Department an instrument relinquishing all rights heretofore acquired by virtue of Departmental approval

> on May 8, 1906, of his former application.[32]

David Wilson subsequently executed a document relinquishing his rights to the initial grant conditioned upon the approval of his amended application, on November 2, 1906.[33] The deeds of conveyance by David Wilson to WWPC are also instructive of the parties' understanding with respect to the Wilson power site.[34] In the deed conveying water rights, executed July 8, 1907, Wilson provided:

> And we hereby authorize and empower the said The Washington Water Power Company, upon its performance of the conditions required by the said Act of Congress of March 3, A.D. 1903, to demand and receive from the United States a patent, or other evidence of title, as the rules of the Interior Department of the United States may prescribe, for the above assigned water right and water power in the same manner to all intents and purposes as we ourselves or either of us might or could do,

> were these presents not executed.[35]

Notwithstanding this suggestion that WWPC might need to secure a patent or other evidence of title in accordance with rules of the Department of the Interior, there is no evidence that WWPC made any effort to discover what documentation, if any, was required when it accepted the Wilson transfer. Nor is there any indication that any such documentation was sought when WWPC later made application for the additional eight acre parcel. WWPC evinced some uncertainty as to the nature of grants made by the Secretary under the Act of 1905 when it directed an inquiry to the Assistant Commissioner of Indian Affairs on May 5, 1909, yet it took no action with respect to the Wilson power site.

No explanation is offered in the record for WWPC's failure, prior to 1923, to take what would appear to be reasonable

measures to secure appropriate documentation from the Secretary. Staff in its reply brief suggests that there is some question as to whether the Secretary would have approved the transfer of the Wilson power site. Staff notes that David Wilson acquired rights to the site by paying slightly more than $1000 in damages to certain Indian tribal members,[36] and then within six weeks, sold the site to WWPC for an enormous profit ranging from $25,000 to $100,000,[37] thereby raising a question of good faith concerning David Wilson's original application. It serves no useful purpose to speculate on what the Secretary's determination might have been in light of these facts. The evidence in this record must establish the nature of authorization, if any, which WWPC received from the Secretary prior to the enactment of the Federal Water Power Act.

In subsequent dealings with the Department of the Interior or the Bureau of Indian Affairs the fact that WWPC had acquired the Wilson power site was admittedly not concealed; however, all references were made to the Wilson grant rather than to a new WWPC grant. This indicates how the Department of Interior carried this grant on its records. This is confirmed by a letter, dated September 27, 1913, the subject of which is shown as the "Application of David Wilson to acquire overflow rights in the Spokane Indian Reservation."[38] If David Wilson had not at that late date filed the application, the General Land Officer apparently assumed that it was an application from the grantee of the Wilson power site.

In a letter, dated February 12, 1910, to the Superintendent of the Colville Indian School about a further amendment of the Wilson grant, reference is made to a

WWPC application "simply to have the description of the grant amended in accordance with the location as fixed by special allotting agent Clair Hunt."[39] Again, WWPC showed no interest in changing the Wilson grant to a WWPC grant to reflect its acquisition thereof. The fact that the Department amended the Wilson grant on the basis of a resurvey and at the request of WWPC, does not establish that an authorization was granted to WWPC.

Following amendment of the Wilson grant in 1910, nothing significant with respect thereto occurred until after the passage of the Federal Water Power Act, on June 10, 1920. Upon an application by WWPC on April 30, 1923,[40] some 13 years after amendment of the Wilson grant, the Assistant Secretary of the Interior, in response to the "question whether or not the Washington Water Power Company is entitled to issuance of patents,"

determined that patents should be issued to WWPC upon its tender of an approved plat of survey.[41]

WWPC explains that it sought a patent in 1923 because "the signature of the Secretary of the Interior [on the maps of the Wilson grant and WWPC's grant[42] had not been acknowledged by a notary public and, therefore, was not in the form which could have been recorded in the county records under Washington law and was probably not in the form generally acceptable to attorneys reviewing the documents on behalf of financial institutions in connection with the issuance of debt securities secured by a mortgage."[43] WWPC believes it was appropriate for the Company to seek a more formal document which was in a form more consistent with that of a deed or patent.

This explanation raises more questions than it answers. If WWPC already

had deeds executed by David Wilson sufficient to transfer the Wilson power site interest, why did WWPC seek a further deed or patent from the Secretary in 1923? If the problem was the omission of the notorization of the Secretary's signature on the maps, why were the maps themselves not corrected in lieu of the issuance of a grant by the Secretary? The matter is not sufficiently explained by a claim that a deed or patent would constitute a "more formal document," when the original evidence of the transaction was not a document, but merely a map. Since both Exhibits 81 and 82, which cover the Wilson grant, are dated in 1906; why did some 17 years elapse before it was deemed appropriate to seek a more formal document? The explanation offered by WWPC is simply not persuasive. The fact remains that the first time WWPC sought authorization from the Secretary for the

Wilson power site was after the enactment of the Federal Water Power Act.

WWPC takes issue with the Staff's and the Secretary's position that in order for the rights granted to David Wilson to be transferred, the Secretary had to execute a formal document of approval, and further, that the burden of proving such a formal document exists is upon the Company. WWPC attempts to distinguish the Act of February 15, 1901 (31 Stat. 790) from the Act of 1905 in that the former restricted a Licensee's right of alienation or transfer, while the latter did not.

While the terms of the Act of 1905 did not prohibit alienation or transfer of a grantee's rights, the requirement that the Secretary pass upon an applicant would perforce require the Secretary to pass upon a transferee. A contrary interpretation would render the

Secretary's obligation to pass upon the recipient of a grant meaningless. Thus, in order for WWPC to possess a valid grant under the Act of 1905, it must have received Secretarial approval of the transfer and there should reasonably be some documentary evidence thereof. The form of such documentary evidence has not been precisely established on this record. But there is evidence of what WWPC and the Secretary ultimately regarded as an appropriate form, to wit, WWPC's application for a patent in 1923 and the Secretary's response thereto in 1924 tendering a grant. Without placing form over substance, the record is simply devoid of documentary evidence in any form indicating Secretarial approval of the transfer of the Wilson grant to WWPC, prior to the enactment of the Federal Water Power Act.

WWPC believes to maintain that the transfer of rights by David Wilson to WWPC was not approved by the Secretary is tantamount to saying that "the Secretary of Interior from 1908 through 1924 was grossly negligent or committed fraud."[44] This assertion is wholely unfounded. As previously noted, the fact that David Wilson had obtained a grant for a power site under the Act of 1905 and, within six weeks of receiving the amended grant, contracted to convey this grant to WWPC was made known to the Bureau of Indian Affairs and the Department of the Interior. The subsequent development by WWPC of the Wilson power site from 1908 to 1911, as well as the 1910 amendment of the Wilson grant, were likewise known to officials handling these matters. But this knowledge by the Department does not compel the conclusion that the Secretary made a grant to WWPC under the Act of 1905

with respect to the Wilson power site. Indeed, a strong indication that WWPC itself was uncertain about the Secretary's action is shown by its application for a patent for that site in 1923. That the Department did not urge WWPC to secure a Secretarial grant for the Wilson power site, does not reflect negligence or fraud, but simply government inefficiency.

The ultimate responsibility to secure the necessary authorization and to comply with existing law falls upon WWPC. The courts have stated that action (or inaction) by government officials cannot bar the government from requiring development owners to comply with applicable statutes and regulations. *Montana Power Co. v. F.P.C.*, 185 F.2d 491, 497 (CADC—1950). Under the circumstances, WWPC is not discharged of its burden of showing that it possesses a permit or valid right of way granted prior to June

10, 1920, as prescribed by Section 23(b) of the Federal Power Act, unless it be concluded that it is in violation of that Act. *United States v. Norfolk-Berkley Bridge Corporation,* 29 F. 2d 115, 124-25 (E.D. Va. 1928).

WWPC asserts that when Congress enacted the Federal Water Power Act of 1920 (FWPA) and the Federal Power Act of 1935, it did not intend to affect any existing rights of way previously granted. This is undisputed. It also contends that Congress intended that the Secretary of the Interior or other agency be permitted to complete the proceedings required for the acquisition of water power rights which have been commenced prior to the 1920 Act. In support, it cites the first proviso of Section 24 (16 U.S.C. 818) which reads as follows:

> Provided, That locations, entries, selection or filings heretofore made for lands

> reserved as water power sites, or in connection with water power development, or electrical transmission may proceed to approve or patent under and subject to the limitations and conditions in this section continued. . . .

Staff correctly notes that the provision cited relates to uses of such lands for other than hydroelectric development. The legislative history of the provision, as cited by Staff, clarifies this point:

> Section 10 [now Section 24] provides that where practicable the Secretary of the Interior may permit locations and entries upon the land for other hydroelectric purposes, but in every case upon the express condition that the entry is made subject to the right of the United States or its lessees or grantees to enter on said land and use so much of it as may be reasonably necessary for the higher purpose of generating and transmitting hydroelectric energy. This provision will enable the Interior Department to prevent hardships to settlers on withdrawn lands without in any way interfering with the water-power possibilities. House

> Report No. 842, 63rd Cong., 2d Sess., for H.R. 16673 (June 16, 1914).

As Congressman Ferris stated in the debates on H.R. 16673:

> The provision . . . provides that where locations, entries, or selections are filed or have been allowed the land shall proceed to patent, subject to a limitation to be inserted in the patent which shall preserve to the Federal Government all rights for power purposes. Cong. Rec., Hse., Vol. 51, page 13624 (August 11, 1914).

Congressman Mondell later stated in debates on S. 1419, concerning the same language:

> The amendment might provide that the commission shall . . . cause an examination to be made of lands that have been heretofore withdrawn for power sites and recommended to the Secretary of the Interior the restoration of such lands as in their opinion are not necessary for power site purposes. . . . If there should be any doubt in regard to that when the bill is in conference, then some slight modification should be made to make it clear that the lands have been withdrawn which are found after

> examination not needed for power development may be restored, the withdrawal revoked, so the entryman may proceed to secure his patent in fee without limitation. Cong. Rec., Hse., Vol. 56, page 10037 (September 5, 1918).

Finally, in a report dealing with the 1935 amendments to the FWPA, it was stated that Section 24 of FWPA provides that lands of the United States included in proposed project "may be opened for other uses by the Secretary of the Interior upon a commission determination that their value will not be injured or destroyed thereby."[45]

Staff contends that in 1924 the Secretary did not, in any event, have authority to approve the transfer of the Wilson grant to WWPC. Citing a ruling of the Attorney General,[46] it maintains that when the FWPA was passed, Congress placed in the hands of the Commission authority over all future and existing hydroelectric

developments, including administrative authority distributed among the Secretaries of the Interior, Agriculture, and War.[47] As pointed out by Staff in discussing the transfer of permits, the Attorney General stated that Section 8 of the Act (16 U.S.C. § 801),[48] in conjunction with Section 29 (16 U.S.C. § 823),[49] vested the Commission with the authority to approve transfers of outstanding permits or licenses issued by the various Secretaries, and that the Secretaries' authority on such matters had ceased.[50] Staff makes a persuasive argument that the Secretary did not have the authority to approve the transfer of the Wilson power site in 1924, but that is beside the point. The Federal Water Power Act prescribes a specific date, *i.e.*, June 20, 1920, by which a valid permit or right of way must have been obtained. Either WWPC obtained a permit or right of way

under the Act of 1905 prior to that date or it did not. As discussed above, the evidence in this case fails to show action by the Secretary on the transfer of the Wilson power site to WWPC prior to June 10, 1920. Since WWPC did not obtain any authorization prior to June 20, 1920, even under WWPC's theory, there was no tentative authorization for the Secretary's action of 1924 to have confirmed.

The Big Bend Precedent

WWPC maintains that most of the issues that are relevant herein were decided in *United States v. Big Bend Transit Co.*, 42 F. Supp. 459 (E.D. Wash 1941) (hereinafter *Big Bend*).

Big Bend was a condemnation case brought by the United States to acquire certain lands on the Spokane River which were flooded upon construction of the Grand Coulee Dam. Big Bend Transit Co.

sought to recover damages for loss of a power site which it claimed had been authorized by the Secretary under the Act of 1905. In *Big Bend,* the Secretary had actually granted the application of the Big Bend Transit Co. (Company) for a power site on the Spokane River on April 13, 1916, and also approved maps for the development on May 18, 1916. Six months before construction was to begin, war was declared and the Company advised the Secretary that, under the circumstances, construction could not be completed within the five years provided by the bond. The Department of the Interior advised the Company to wait until the five year period had expired before renewing its application. Subsequently, the Company decided that in order to finance the project it would require more satisfactory evidence of its title. In 1927, after a resurvey, the Secretary issued a

corrective grant. The project was never built as it became apparent that the construction of the Grand Coulee would flood the area involved. In permitting the value of the power site to be considered by a jury in this condemnation action, the Judge found that the 1916 grant of the Secretary was a valid pre-1920 permit under Section 23 of the Federal Water Power Act and that rights obtained under the Act of 1905 were not repealed by the passage of the Federal Water Power Act. *Big Bend* is clearly distinguishable on its facts from the instant case.

The principal distinction between this case and *Big Bend* is that in *Big Bend* it was clear the Big Bend Transit Co. received the requisite approval for the power site from the Secretary, prior to June 10, 1920; whereas here, the Secretary did not grant rights in the Wilson power site to WWPC prior to June 10, 1920. The

only rights which WWPC obtained from the Secretary prior to 1920 were to the eight acre parcel and related water rights. This is insufficient to exempt WWPC from Commission jurisdiction. In *Big Bend* the Secretary's action in 1927 merely confirmed a previous grant made to the Big Bend Transit Company; whereas here, the grant which the Secretary made in 1924 was the first approval received by WWPC of rights to the Wilson power site.

Another distinguishing factor is that in *Big Bend* the court was concerned with the right of the Big Bend Transit Co. to be compensated for its property interest in a power site; hence, the nature of its authorization from the Secretary was a collateral issue. In this case, however, WWPC's property interest in the Wilson power site is not an issue. Rather, the issue is whether WWPC obtained proper authorization under Act of 1905, prior to

the enactment of the Federal Water Power Act.

Many of the holdings in *Big Bend* alluded to by WWPC have no relevancy in this case. For instance, the Court's holding that the interest of a grantee in a right-of-way rests upon the approval of the map illustrating its location[51] has no application here because WWPC has not shown an approved map in connection with a grant made to it for the Wilson power site[52] prior to June 10, 1920. Similarly, the fact that the court found the Federal Water Power Act did not repeal the Act of March 3, 1905, is not determinative of whether WWPC had a valid permit for the Wilson power site prior to June 10, 1920. As the court explained:

> They argued that I must disregard Section 223 because they deny that on June 10, 1920, this defendant had any valid existing right of way which had theretofore been granted or any claim or any authority

> theretofore given pursuant to law. Since I have held that on June 10, 1920, defendant did have a valid and existing right of way and a claim of authority theretofore given pursuant to law, it follows necessarily that that right of way, grant or authority was not affected by any of the provisions of the Power Act. (*Big Bend* at 471)

The threshold jurisdictional question must necessarily be determined on the facts of this case. As discussed above, the facts of this case lead to the conclusion that WWPC does not have a valid pre-1920 permit.

WWPC contends that, as in *Big Bend*, the United States should be estopped from challenging the Company's title to the power site or the validity of grants. Estoppel does not apply in these circumstances. As stated earlier, WWPC's interest in the Wilson power site is of no concern here. And, no challenge is directed at a WWPC grant, because, except

for the eight acre parcel, none was made prior to June 10, 1920.

The fact that 70 years have elapsed since WWPC acquired the Wilson power site and constructed its hydroelectric development does not preclude enforcement of applicable statutes. The doctrines of laches and estoppel do not apply to jurisdictional proceedings. *Essex Co., et al.*, Docket No. E-9099, order issued June 17, 1976, 55 FRC 2926 at 2930.

It is concluded, absent a pre-1920 permit, that the Little Falls development is subject to the jurisdiction of the Federal Energy Regulatory Commission.[53] Whether or not WWPC must secure a license for its Little Falls development depends upon the finding of a basis under the Act, e.g., navigability of the Spokane River, for Commission assertion of its licensing jurisdiction.

Assertion of Licensing Jurisdiction

The two principal bases for jurisdiction which were litigated herein are navigability of the Spokane River and the hydraulic and electrical coordination of the Little Falls development with other developments of Project No. 2545.[54] The issue of navigability will be addressed first.

Navigability

Section 3(8) of the Federal Power Act defines "navigable waters" as:

> [t]hose parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting

> falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority[.][55]

The Supreme Court, in first passing on the question of navigability, established what has become known as the *Daniel Ball* definition of navigable waters:

> [t]hose rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a

> continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.[56]

Subsequent case law expanded this *Daniel Ball* definition to include waters which are "capable of use for the purposes of transportation and commerce"[57] and, later, "availab[le] for navigation given reasonable improvements."[58] The Court's most recent pronouncement on the meaning of "navigable waters" under the Federal Power Act is found in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), where the following standards on navigability of waters were set forth:

> When once found to be navigable, a water remains so.
>
> * * *
>
> [Navigability can be found] despite the obstruction of falls, rapids, sand bars, carries or shifting currents.
>
> * * *

> [A]bsence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense.
>
> * * *
>
> [N]avigability may be of a substantial part only of the waterway in question.[59]

Furthermore, as resently [sic] observed by the Commission, the historic floatation of logs has, of late, played an increasingly dominant role in determining the navigability of waterways for purposes of the Federal Power Act. *Pyramid Lake Paiute Tribe of Indians v. Sierra Pacific Power Company,* Opinion No. 61, Docket No. E-9530, issued August 10, 1979, 8 FERC ¶ — mimeo p. 13 (citations).

WWPC contends that while court decisions of the past 40 years might bring legislation enacted during that period within the commerce clause, it was not the

intent underlying the 1905 Act—under which Little Falls Dam was constructed—, the 1920 Federal Water Power Act or the Federal Power Act of 1935. WWPC relies on the early *Daniel Ball* case;[60] *United States v. The Montello;*[61] and *Leovy v. United States,* 177 U.S. 621 (1900), because they were decided "at a time which was fairly contemporaneous with the passage of the Act of March 3, 1905 and . . . [thus] show the intent of Congress at that time."[62] In particular, WWPC urges that the true legal test for navigability was articulated in the *Leovy* case:

> It is a safe inference from these and other cases to the same effect which might be cited, that the term "navigable waters of the United States," has reference to commerce of a substantial and permanent character to be conducted thereon.[63]

Of concern here are "navigable waters of the United States" under Section 3(8)

of the Federal Power Act, and the standards set forth in *United States v. Appalachian Electric Power Co., supra,* are held "fully applicable" to "navigable waters under Section 3(8) of the Act." *Rochester Gas and Electric Corp. v. F.P.C.,* 344 F.2d 594, 596 (CA2—1965), *cert. denied,* 382 U.S. 832 (1965).[64] Moreover, as noted by the Supreme Court in *United States v. Appalachian Electric Power Co., supra,* each subsequent application of the so-called *Daniel Ball* test for navigability was "apt to uncover variations and refinements which require[d] further elaboration." *Id.* at 406. Accordingly, the more refined standards which have been elaborated will be applied. Those standards, as restated and summarized by the Second Circuit of Appeals, are that a stream is a navigable waterway "if (1) it *presently* is being used or is suitable for use, or (2) it has

been used or was suitable for use in the past or (3) it could be made suitable for use in the future by reasonable improvements." *Rochester Gas and Electric Corp. v. F.P.C., supra* at 596 (emphasis in original).

Evidence on Navigability

The Spokane River begins at Coeur d'Alene Lake in Idaho, flows in a west/northwesterly direction into Washington where it joins the Columbia River, a navigable waterway of the United States. Post Falls, Idaho, which is a natural 40 foot drop, is about eight miles below Lake Coeur d'Alene. Spokane Falls, which is about a 150 foot drop, is located in the City of Spokane, about 33 miles below Lake Coeur d'Alene. The Little Falls Dam is about 25 miles west of Spokane.[65]

Most of the evidence of navigation over the Spokane River consisted of written accounts of the transportation of

logs. Exhibit 126, for example, tells of log flotation from the entrance of the Spokane River to Spokane and beyond:

> In early days logs destined for the McGoldrick Mill were driven down the Spokane River to the millsite not far above Spokane Falls. Many of these logs came from high up on the St. Maries River, were driven down to the St. Joe, caught in booms at the sorting gap, towed across the lake, and let loose at the entrance of the Spokane River. Some of these logs made a journey of one hundred and fifty miles, all by water . . . .
>
> As the drive neared Spokane it netted, as always, a big audience on the riverbanks and bridges.[66]

The location of these logging activities was illustrated by Exhibit 130, a Spokane River Basin Map, which shows that most of the logs were felled in Idaho and floated downriver toward the saw mills in Spokane.

Exhibit 127, p. 2, documents Spokane's "first industrial venture," a saw mill set up in 1873 and supplied with

logs which had floated down the Spokane River.[67]

Exhibit 129 includes an 1884 newspaper account of a large log drive down the Spokane River to Spokane Falls:

> Yesterday the font [sic] end of the mammoth log drive that A.M. Cannon is bringing down the river reached this city, and his saw mill, that has been standing idle for some time for want of material to work on started up this morning and will keep going at full capacity the balance of the year. Mr. Cannon has succeeded in securing a valuable lot of logs this summer. The river is actually full of them. Over one million feet have already reached the mill, and between three and four million feet are on the way down.[68]

Exhibit 133 advises of a suit brought in 1900 against the Spokane and Idaho Lumber Company for violation of federal statutes prohibiting pollution of navigable waterways. According to the article, the U.S. Marshall in the case

found that the Spokane River was a navigable stream.[69]

Exhibit 128 reports another case, *Spokane Mill Co. v. Post et al.*, 50 F. 429 (D. Idaho 1892), where a Spokane mill operator sued the owner of the Post Falls Dam, seeking to enjoin obstruction of the river. The operator's logs had apparently gathered at defendant's dam and were unable to pass. The court refused to grant the equitable remedy of injunction, but noted, in dicta, that the facts "indicate that the Spokane river is of sufficient size and of such a channel as to be held a public highway."[70]

Exhibit 87 is a 1932 report by the Corps of Engineers (Corps) accessing the navigability of the Spokane River. Among other things, the report acknowledges log flotation "from the lake to Post Falls, and to points below in the very early days of settlement in Spokane."[71] Interest-

ingly, this report also quotes the following passage from a 1905 letter:

> There was only one boat ever made the trip from Spokane to Coeur d'Alene was hauled out of the river here and transported by the team over the dam. In high water small steamers can make between Spokane and Post Falls, but as there is no trade no one does it.[72]

In a public notice dated June 18, 1957, the Corps apparently advised all concerned that the Spokane River was navigable as far as Little Falls Dam. *See* Exhibit 131. And, in a 1975 letter to the Spokane Tribal Chairman, the Corps expressed its view that "[t]he Spokane River is currently considered a navigable waterway of the United States from its mouth to Little Falls Dam at river mile 29.3."[73]

Exhibit 125 shows that in 1875 the Legislative Assembly for the Territory of Washington passed a law declaring the

Spokane to be "navigable and a public highway from its mouth to the point where it is crossed by the line dividing Idaho and Washington Territories, for the purpose of rafting, driving and floating logs, timber and other material."[74] WWPC challenges this particular exhibit as "incompetent evidence"[75] which "cannot create a navigable waterway of the United States from a stream which is not navigable in fact."[76] While it is true that, standing alone, the statute would not compel a finding of navigability, it nonetheless suggests the river's suitability for the prescribed purposes.

WWPC seems to concede that all of the foregoing evidence would support a finding of navigability over the Spokane River, but only for the stretch between Lake Coeur d'Alene and Spokane Falls. WWPC argues that no competent evidence of navigation below Spokane Falls is in this

record. Relying exclusively on the Corps' conclusion in its 1932 report (Exhibit 87, p. 4) that the Spokane River is not a navigable stream of the United States, WWPC believes the evidence demonstrated that the River is not navigable.

First, it should be noted that the evidence disclosed logging activity as far as the Little Falls Dam which is well below Spokane Falls. *See e.g.*, Exhibits 103 & 131. If the river is navigable above the Little Falls Dam, it is, for jurisdictional purposes, navigable below. *Rochester Gas and Electric Corp. v. F.P.C., supra* at 595 (citations). Indeed, it would be reversible error to limit our focus to a particular part of the river. *Pyramid Lake Paiute Tribe of Indians v. Sierra Pacific Power Company, supra,* mimeo at p. 33. And, contrary to WWPC's claim, there is evidence of past navigation below Little Falls Dam:

> During the winter of 1825-26 three large boats for use on the Columbia River were built at Spokane House. They were forty feet long and constructed of cedar boards of the same length. It was necessary to find cedar trees with long, straight, clear trunks and to saw the log longitudinally (whip-saw)—a tedious process, as two men could produce little more than 100 board feet in a working day. The finished craft were run down the Spokane River in April, when the river was swollen by the spring floods. One of the boats struck a rock and narrowly escaped destruction; the other two came through unscathed.[7]

The Corps' report to Congress in 1938 (Exhibit 104), which weighs the feasibility of improvements to the river below Spokane Falls, suggests that these waters were regarded as within Congress' commerce power. In short, WWPC has ignored all this other evidence of navigability as well as the Corps' statement, subsequent to 1932, that the Spokane River is

considered navigable to Little Falls Dam.[78]

The evidence, taken in its entirety, is sufficient to establish navigability under § 3(8) of the Federal Power Act. The evidence was largely of past use and suitability for use, and the use occurred primarily over the river's stretch from Coeur d'Alene, Idaho into the State of Washington, thus placing it in interstate commerce. It is therefore found that Little Falls Dam is situated on a "navigable water of the United States."

Hydraulic and Electrical Coordination

Another basis suggested for the exercise of Commission licensing jurisdiction over the Little Falls development is its coordinated operation with the other developments of Project No. 2545. The fact that Little Falls operates in a coordinated manner is undisputed. WWPC states on brief that "the Little

Falls development is operated in coordination with the other developments on the Spokane River and is operated in coordination with the other developments owned by the Company and owned by numerous other utility entities, both publicly and privately owned in the Pacific Northwest."[79]

The issue, as framed by the Commission in its order, poses the question whether Commission licensing jurisdiction could properly be asserted on the basis of coordination," *regardless of* the existence of a pre-June 10, 1920 permit or valid right of way."[80] WWPC maintains that this is "purely an issue of law," and cites Section 23 of the Federal Power Act[81] and extensive legislative history in support of the proposition that coordination cannot serve as a basis for the assertion of jurisdiction where there is a claimed pre-1920 permit.

Staff in its brief reviews the evidentiary record, establishing that the Little Falls development operates in a coordinated fashion, and concludes that in light of the complete unit of development standard, the Little Falls development should be licensed as part of Project No. 2545.[82] Staff Counsel does not, however, address the question as posed by the Commission. Counsel for the Secretary and Counsel for the Spokane Tribe, while supporting the licensing of the Little Falls development as an integral part of Project No. 2545, do not meet the Section 23(a) argument advanced by WWPC.

WWPC in its reply brief concedes, on the basis of Sections 3(11), 4(e) and 10(a) of the Federal Power Act and the authorities cited by the parties, that if it were voluntarily applying for a license under Section 23(a) "it would be appropriate to include the Little Falls

Project in the license for Project No. 2545."[83] But it maintains that upon finding that it has a valid pre-1920 permit, the Commission could not, in any event exercise its licensing jurisdiction on the basis of coordination. While WWPC's presentation on this issue is persuasive, the finding herein that WWPC does not have a valid pre-1920 permit makes the resolution thereof unnecessary.

The record as well as the argument of Counsel on this issue are, nevertheless, instructive. As was noted previously, it is clearly established that the Little Falls development is fully coordinated with the other developments of Project No. 2545 as well as with other developments in the Pacific Northwest.

It is also undisputed that the hydraulic and electric coordination in a comprehensive development provides an independent basis upon which the

Commission may exercise its licensing jurisdiction[84] Moreover, the transmission of hydroelectric energy in interstate commerce may also provide a basis for jurisdiction. *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90 (1965), *reh. denied*, 381 U.S. 956 (1965).

In the instant case, it has been shown that the coordinated operation of the Little Falls development with the other developments on the Spokane River render the development a part of an integrated system providing for the comprehensive development of the water power resources of the Spokane River.[85]

In addition to the determination of hydraulic and electrical coordination as a basis for licensing jurisdiction, the evidence and authorities presented on this issue compel the licensing of the Little Falls development as part of Project No.

2545, rather than as an individual project, in any event.

Accordingly, WWPC will be ordered to file an amendment to include the Little Falls development within the License for Project No. 2545.

Additional Findings and Conclusions

Upon consideration of the entire record, including the briefs filed by the parties, it is further found and concluded that:

(1) The Washington Water Power Company is a corporation organized under the laws of the State of Washington and is a licensee of this Commission for Project No. 2545.

(2) The Washington Water Power Company owns, operates and maintains the Little Falls development on the Spokane River.

(3) The Little Falls power site is fully developed. The Little Falls

development is fully coordinated with the developments included in Project No. 2545 and all other hydroelectric facilities covered by the Pacific Northwest Coordination Agreement.

(4) The Little Falls development is a hydroelectric project with an installed capacity of 38 mw situated in and across a reach of the Spokane River that is a navigable water of the United States and thereby warrants the exercise of licensing jurisdiction by the Federal Energy Regulatory Commission.

(5) The Washington Water Power Company operates and maintains the Little Falls Dam in and across the Spokane River, a navigable water of the United States within the State of Washington, together with water conduits a power house, and other works of the Little Falls project incidental to the development of electric power across, along or in the Spokane

River, without having a permit granted prior to June 10, 1920 or a license granted pursuant to the Federal Power Act, in violation of Section 23(b) of the Federal Power Act.

(6) The Washington Water Power should be directed to file for an amendment of its license for Project No. 2545 to include the Little Falls development.

(7) In light of the apparent good faith belief by the Washington Water Power Company that it was in possession of a valid authorization by the Secretary of the Interior for the Little Falls development, and in view of its continuing operation of that development which has provided electric energy to the region for some 70 years, it would not be in the public interest to compel the cessation of operations at the moment it is determined that a license is required.

Order

Wherefore, it is ordered, subject to review by the Commission on appeal, or upon its own motion as provided in the Commission's Rules of Practice and Procedure, that:

(A) Within 90 days of the effective date of this decision, Washington Water Power Company shall file an application pursuant to the Federal Power Act and the Commission's Rules and Regulations thereunder to amend its license for Project No. 2545 to include as part of the project the Little Falls development.

(B) Pending the filing and diligent pursuit in good faith of an amendment of the license of Project No. 2545 to include the Little Falls development, the Washington Water Power Company may continue the operation of the Little Falls development until further order of the Commission.

- Footnotes -

[1] Post Falls is the uppermost development on the Spokane River about nine miles below Coeur d'Alene Lake, Idaho. Little Falls Development is the farthest downstream development on the Spokane River, about 30 miles from where it joins the Columbia River.

[2] Additional unresolved issues involving title to the banks and beds of the Coeur d'Alene Lake will be determined in a subsequent proceeding.

[3] Since the licensing of the Post Falls development is no longer in issue, the issues set forth below are applicable only to the Little Falls development.

[4] *Washington Water Power Company,* Project No. 2545, "Order Providing For Hearing," issued July 20, 1977, mimeo pp. 3-4.

[5] Tr. 366.

[6] *See* § 23b, *The Federal Power Act,* (16 U.S.C. 817)

> (b) It shall be unlawful for any person, State or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam,

except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act.

[7] Exhibit 77.

[8] Exhibit 3 (33 Stat. 1006).

[9] *Id.*, Section 2.

[10] *Id.*

[11] *Id.*, Section 3.

[12] Exhibits 4, 5, 11, & 16.

[13] Exhibit 23.

[14] Exhibit 26.

[15] Exhibit 27.

[16] Exhibits 28 & 29.

[17] Exhibit 34.

[18] Exhibit 28-29.

[19] Exhibit 51.

[20] Tr. 182.

[21] Tr. 185.

[22] Exhibit 56.

[23] Exhibit 57.

[24] Exhibit 59.

[25] Exhibit 68.

[26] Exhibit 69.

[27] Exhibit 73.

[28] Exhibits 74 & 75. In his decision, the Secretary stated: "Inasmuch, therefore, as the Act of 1905 does not expressly or by implication authorize or direct the issuance of a patent, and as the case is one in which said granting Act of 1905, with the approved map, makes a transfer of a limited fee, with an implied reverter, the Department is without authority to issue a patent in the premises. (*Shaw v. Kellogg*, 170 U.S., 312, 342)." (Exhibit 75, p. 7)

[29] Exhibit 77.

[30] WWPC's Initial Brief p. 9.

[31] § 2 of the Act of March 3, 1905 (Exhibit 3).

[32] Exhibit 23.

[33] Exhibit 19.

[34] *See* Exhibits 29 & 54.

[35] Exhibit 29.

[36] Exhibit 23.

[37] Exhibits 25, 28, 29.

[38] Exhibit 69.

[39] Exhibit 63.

[40] Exhibit 76 indicates that WWPC filed an application on April 26, 1923.

[41] Exhibit 73.

[42] Exhibits 81, 82 & 83.

[43] WWPC's Initial Brief p. 9 (bracketed material added).

[44] WWPC's Reply Brief, p. 6.

[45] 74th Cong., 1st Sess., page 47 (May 13, 1935).

[46] 32 Op. Atty. Gen. 525, 528 (1921).

[47] The courts have stated that the passage of the FWPA was illustrative of Congressional intention to centralize federal authority over water power resources in one government agency. *Northwest Paper Co. v. F.P.C.*, 344 F. 2d 47, 51 (CA8—1965).

[48] Section 8 of the Act provides: That no voluntary transfer of any licensee or of the rights thereunder granted, shall be made without written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all conditions of the license under which such rights are held by such licensee and also subject to all provisions and conditions of this Act to the same extent as though such successor as assign were the original licensee hereunder . . . .

[49] Section 29 of the Act provides: That all Acts or parts of Acts inconsistent with this Act are hereby repealed . . . .

[50] Section 23(a) of the Act, (16 U.S.C. § 816) preserves the rights granted prior to June 10, 1920, to the legal holders of such rights with the passage of the FWPA. All inconsistent acts were repealed, such as those provisions of the Act of February 1, 1905 (33 Stat. 628), relating to hydroelectric developments, including any provisions relating to transfers. *See* 32 Op. Atty. Gen., *supra.*

[51] *Big Bend* at 472.

[52] The approved resurvey map resulted in an amendment of the Wilson grant.

[53] Having determined that WWPC does not possess a valid pre-June 10, 1920 permit, Staff's further contention that WWPC should have obtained a permit to occupy navigable waters from the Secretary of War pursuant to the River and Harbor Act of 1899 (33 U.S.C. 401 *et seq.*), is not reached and, therefore, need not be addressed.

[54] Staff urges that upon a finding that WWPC does not have a valid pre-1920 permit to use all of the lands occupied by the development within the Spokane Indian Reservation an additional basis under Section 23(b) for the assertion of Commission jurisdiction would be WWPC's occupancy of lands within a reservation as defined by Section 3(2) of the Federal Power Act (16 U.S.C. 796(2)). Since either navigability or hydraulic and electrical coordination provide an adequate ground for the assertion of Commission jurisdiction, it is unnecessary to explore the further basis suggested by Staff on brief.

[55] 16 U.S.C. 796(8).

[56] *United States v. The Daniel Ball*, 77 U.S. 557, 563 (1871) (10 Wall.).

[57] *United States v. The Montello*, 87 U.S. 430, 441 (1874) (20 Wall.); *United States v. Utah*, 283 U.S. 64 (1931).

[58] *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 406-408 (1940).

[59] *United States v. Appalachian Electric Power Co., supra* note 58 at 408-410 (citations omitted).

[60] *Supra* note 56.

[61] *Supra* note 57.

[62] WWPC's Reply Br. pp. 18-19.

[63] *Leovy v. United States*, 177 U.S. 621, 632 (1900).

[64] Citing *Montana Power Company v. F.P.C.*, 185 F. 2d 491, 494-95 (CADC-1950), *cert. denied*, 340 U.S. 947 (1951); *Georgia Power Company v. F.P.C.*, 152 F. 2d 908, 912-13 (CA5—1946); *State of Wisconsin v. F.P.C.*, 214 F. 2d 334, 337-38 (CA7—1954), *cert. denied*, 348 U.S. 883 (1954).

[65] Exhibits 87, 129 p. 3 & 130.

[66] Exhibit 126 p. 4 [El Hult, R. Steamboats In The Timber 88 (1952)].

[67] Brier, *Sawdust Empire* 181 (1958).

[68] Exhibit 129 p. 2 [*Spokane Falls Evening Review,* Vol. I No. 26, July 10, 1884].

[69] *American Lumberman,* August 25, 1900.

[70] Exhibit 128 p. 6 [*Spokane Mill Co. v. Post et al.*, 50 F. 429, 433 (D. Idaho 1892).]

[71] Exhibit 87 p. 2 [Sturdevant & Robins, *Report on Navigability of Spokane River, Washington and Idaho,* April 29, 1932.]

[72] *Id.* at p. 3.

[73] Exhibit 103, p. 1.

[74] Exhibit 125, p. 3.

[75] WWPC's Initial Brief, p. 20.

[76] WWPC's Reply Brief, p. 18 (citations omitted).

[77] Exhibits 158 p. 5 [Kingston, *Spokane House State Park In Retrospect,* 39 PAC. N.W.Q. 191 (July 1948) (citing Elliot, *Journal of John Work,* 5 W.H.Q. 283 (October 1914))]; *see also* Exhibit 157 p. 5.

[78] Exhibits 103 & 131.

[79] WWPC's Initial brief, p. 26.

[80] *Supra* note 4.

[81] Section 23(a) provides:

> The provision of this Part shall not be construed as affecting any permit or valid existing right of way heretofore granted or as confirming or otherwise affecting any claim or as affecting any authority heretofore given pursuant to law, . . .

[82] Citing, *Pacific Gas and Electric Co.*, 2 FPC 516 (1941), *Montana Power Co.*, 7 FPC 163 (1948), *Montana Power Co.*, 15 FPC 1330, 1335 (1956), *Georgia Power Co.*, 37 FPC 620 (1967), *California Oregon Power Co.*, 23 FPC 59, 63 (1960), *Niagara Mohawk Power Corp.*, Project No. 2645, (order issued July 3, 1978, 4 FERC ¶ —) and *Pacific Gas and Electric Co.*, 29 FPC 1265, 1266 (1963).

[83] WWPC Reply Brief, p. 28.

[84] Section 10(a) Federal Power Act.

[85] *See generally* note 82, *supra.*

15 FERC ¶ 61,039

The Washington Water Power Company, Project No. 2545

Opinion No. 117; Opinion and Order Affirming, with Modifications, the Initial Decision on Jurisdiction

(Issued April 8, 1981)

Before Commissioners: Georgiana Sheldon, Acting Chairman; Matthew Holden, Jr., George R. Hall and J. David Hughes.

[Note: Initial Decision determining Commission jurisdiction over hydroelectric development was issued April 1, 1980 and appears at 11 FERC ¶ 63,001.]

Appearances

Jerry K. Boyd, Alan P. O'Kelly, Lee S. Sherline, and *Peyton G. Bowman, III* on behalf of the Washington Water Power Company.

Robert D. Dellwo and *Gary T. Farrell* on behalf of the Coeur d'Alene and Spokane Indian Tribes.

Charles E. O'Connell, Jr. on behalf of the Secretary of the Interior.

Linda Lee and *Peter Lesch* on behalf of the Staff, Federal Energy Regulatory Commission.

[Opinion No. 117 Text]

The Washington Water Power Company (WWPC), contends herein that it is authorized by a permit or permits granted prior to June 10, 1920, the date of the Federal Water Power Act (FWPA), to continue to operate and maintain its Little Falls hydroelectric development on the Spokane River in the State of Washington. We find that WWPC has authority under one such permit to utilize lands of the Spokane Indian Reservation and waters on the reservation side of the river for that purpose, but we also find that its authority thereunder is insufficient for the continued operation and maintenance of that development other than under and in accordance with the terms of a license granted pursuant to the Federal Power Act (FPA).[1] Since the parties agree that the Little Falls development should be licensed, if at all,

as part of WWPC's Project No. 2545, and since that development is coordinated with the other developments of that licensed project, we affirm with certain modifications the Initial Decision issued herein on April 1, 1980, requiring WWPC to file an application to amend its license for Project No. 2545 to include the Little Falls development.

As more fully discussed herein, the Secretary of the Interior (Interior), in 1906, granted David Wilson (Wilson) under the Act of March 3, 1905, the right to utilize waters of the Spokane River and 100 acres of the Spokane Indian Reservation at Little Falls for the development of water power. In 1907 Wilson transferred those rights to WWPC without first obtaining Interior's permission. In 1908 Interior granted WWPC under the Act of March 3, 1905, the right to utilize waters of the Spokane River and 8 addi-

tional acres of the Spokane Indian Reservation at Little Falls for the development of water power. In 1910 WWPC completed its water power development utilizing the 108 acres. And in 1924, after the FWPA was enacted, WWPC obtained a patent from Interior for the 108 acres.

In order to resolve the ultimate question of whether WWPC is required to license the continued operation and maintenance of its Little Falls water power development, it is necessary to consider, first, the nature and extent of the pre-FWPA authorization that will substitute for a current license under the FPA to continue to operate and maintain a hydro-electric development. And it is necessary to consider, second, the nature of such authorization held by WWPC under the Act of March 3, 1905.

Section 23(b) of the Federal Power Act

Our analysis begins with the first sentence of Section 23(b) of the FPA, which was enacted in 1935[2] and states:

> It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act.

The first sentence of Section 23(b) was derived principally from and generally parallels the wording of the licensing authority of the Commission[3] under Section 4(d) of the FWPA, which became Section

4(e) of the FPA.[4] It was also derived in part from the first paragraph of Section 23 of the FWPA, which became Section 23(a) of the FPA. The interaction of these provisions goes to the roofs of the FWPA and, consequently, Part I of the FPA.

The principal purpose of the FWPA was to establish a national policy to promote the comprehensive development of water power on government lands and navigable waters other than by the government itself, and to administer that policy by abolishing the piecemeal authorities of the Secretaries of Agriculture, the Interior and War over the nation's hydroelectric resources and centralizing them in the Federal Power Commission.[5]

The national policy was centralized in the Commission through the authority in Section 4(d) to issue licenses for the purpose of constructing, operating and maintaining works necessary or convenient

for the development, transmission and utilization of power across, along, from or in any of the navigable waters of the United States, or upon any part of the public lands and reservations of the United States. And the piecemeal authorities of the Secretaries were abolished by Section 29 which provided that all inconsistent acts and parts of acts were repealed.[6]

While the FWPA repealed inconsistent laws, it provided in the first paragraph of Section 23 that the FWPA

> shall not be construed as affecting any permit or valid existing right of way heretofore granted, or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality, holding or possessing such permit, right of way, or authority may apply for a license hereunder, and upon such application the commission may issue to any such applicant a license in accordance with the

> provisions of this Act, and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder . . . .

The FWPA thus provided an option for those who, on June 10, 1920, had authority to utilize government lands and navigable waters for the development of water power.[7] They could continue to utilize

Congress transformed the FWPA into Part I of the FPA in 1935 and made compliance mandatory by enacting the first sentence of Section 23(b) stating that it shall be unlawful to engage in the activities that the Commission licenses "except under and in accordance with" proper authorization. Congress limited that authorization to (1) a license granted pursuant to the FPA or, (2) in the light of Section 23(a) pertaining to authority existing on June 10, 1920, "a permit or valid existing right-of-way granted prior to" that date.

The first sentence of Section 23(b) prohibits the construction, operation, or maintenance of water power developments utilizing "navigable waters" or any part of the "public lands" or "reservations" of the United States, without proper authorization. It is apparent that no authorization is required if the continued

operation and maintenance of the Little Falls development does not require WWPC to engage in any of the activities specified in Section 23(b) as requiring licensing. The threshold inquiry, therefore, is whether any of the quoted bases for the licensing requirement exist.

WWPC states, in this connection, in its brief on exceptions, that it "does not take exception to a finding that the Spokane River constitutes navigable water as defined in Section 3(8) of the Federal Power Act." Since our concern herein with respect to the navigability of the Spokane River pertains only to navigability within the purview of the term "navigable waters" as defined in the FWPA/FPA, WWPC is deemed to have waived any further objections to navigability. 18 CFR § 1.31(c). Furthermore, as discussed under "The Act of March 3, 1905", *infra*, we have concluded that the Little Falls development is

constructed in part on "reservations" of the United States within the purview of the FWPA/FPA. Accordingly, we find that the continued operation and maintenance of the Little Falls development requires proper authorization, either in the form of a license granted pursuant to the FPA, or a permit or valid existing right-of-way granted prior to June 10, 1920.

The first sentence of Section 23(b) is instructive as to the nature and extent of the pre-FWPA authorization that will suffice in lieu of a license. It prohibits the utilization of navigable waters and the construction of dams in navigable waters for the development of power, authorization for which was formerly vested in the Secretary of War.' And it prohibits the utilization of public lands and reservations of the United States for the development of power, authorization for which was formerly vested in the

Secretaries of Agriculture and the Interior, depending on which Secretary had jurisdiction over particular public lands or reservations. In other words, we look toward the former piecemeal authorities of the three Secretaries that were centralized in the Commission.

The first sentence of Section 23(b) indicates that the pre-FWPA authorization must cover *all* of the jurisdictional activities that are prohibited by it in the absence of such authorization or a license. If both a "reservation" and "navigable waters" of the United States are utilized to develop electric power, authority to utilize both must co-exist.[10] If there is authority to utilize the "reservation" but not the "navigable waters", the operation and maintenance of a power development without a license would be unlawful under Section 23(b) to the extent that "navigable waters" are

utilized. So, too, if there is authority to utilize only part of a "reservation" used for a power development, the operation and maintenance of the power development on the other part of the "reservation" would be unlawful under Section 23(b) without a license. And pre-FWPA Federal authorization to utilize navigable waters, without similar authorization to operate and maintain a dam in those waters, would be unlawful under Section 23(b) in the absence of a license.

We emphasize, in this connection, that the question is not whether authorization was required under the superseded statutes. That is irrelevant. The question is whether a specific jurisdictional activity is now prohibited by the first sentence of Section 23(b) in the absence of authorization, and, if so, whether authorization to engage in all

such activities co-existed on June 10, 1920, the date chosen by Congress in 1935 to coincide with the date of the FWPA. The stated purpose of that provision was to bring under the Commission's jurisdiction all hydro-electric developments with which the United States has any valid concern.[11] With the centralization of the piecemeal authorities in the Commission, it is apparent that pre-FWPA permittees with authority to engage in only some of the activities that are prohibited by the first sentence of Section 23(b), must be required to obtain licenses if that provision is to be obeyed. Otherwise, they would be allowed to violate that provision.[12]

Finally, the first sentence of Section 23(b) prohibits the specified jurisdictional activities "except under and in accordance with the terms of a permit" granted prior to June 10, 1920, or

a license. While an assignee of a permit might arguably operate and maintain a water power development "in accordance with" its terms, only the named recipient would be able to operate the development "under" the permit. That named recipient could be the original grantee, or the assignee of the original grantee upon the issuance of another permit. We emphasize, in this connection, that the question is not whether transfer was required under the superseded statutes and regulations. The question is whether one claiming pre-FWPA authorization is able to engage in the prohibited activities "under and in accordance with the terms" of a pre- FWPA permit or right-of-way.

Interior did not issue formal permits under the Act of March 3, 1905, containing a variety of terms, as such. As shown by Exhibit 49, for example, Interior endorsed approvals on (1) Office of Indian Affairs

letters transmitting, and recommending approval of, applications for permits and (2) the accompanying maps.[13] Applications for permits under the Act of March 3, 1905, contained representations that were intended to satisfy the Secretary of the Interior, as required by that Act, that the applications were made "in good faith and with intent and ability to use" the lands granted thereunder for the purposes specified in that Act. Those representations were personal to the applicants and, under such circumstances, we would construe the phrase in Section 23(b) "terms of a permit . . . granted prior to June 10, 1920" as including those personal representations. Accordingly, we conclude that only the named recipients of the permits can operate and maintain water power developments "under and in accordance with" the terms of those permits. Conversely, we conclude that an

assignee who has not effected a transfer of the permit to the assignee's name cannot operate and maintain a water power development "under and in accordance with" its terms within the purview of Section 23(b).[14]

We turn next to "The Act of March 3, 1905" pursuant to which WWPC claims authority under a permit or permits granted prior to June 10, 1920.

The Act of March 3, 1905

David Wilson, who owned land on the south bank of the Spokane River at Little Falls, wanted to obtain an interest in land within the Spokane Indian Reservation on the north bank, and the right to utilize the Spokane River, for the construction and operation of a water power development. He could have obtained a license for the use of the land under the Act of February 15, 1901 (31 Stat. 790), which was applicable to public lands

and reservations generally, but such a license was revocable at the discretion of Interior and did not include the use of the water. Wilson was unwilling to invest in a water power development under such circumstances and, as a result, he and another individual caused Congressman Jones of Washington to sponsor a bill that became the Act of March 3, 1905 (33 Stat. 1006).

That Act empowered the Secretary of the Interior to permit citizens, associations and corporations of the United States to acquire "the use of the waters of the Spokane River where the said river forms the southern boundary of the Spokane Indian Reservation . . . by appropriation under and pursuant to the laws of the State of Washington."[15] It also empowered Interior to grant such appropriator or appropriators lands within the Spokane Indian Reservation for the erection of

structures for the development of power or for the beneficial use of the water.[16] Interior adopted regulations for the administration of the Act, but the parties to this proceeding were unable to obtain a copy for the record.[17]

The Acting Commissioner of Indian Affairs reported on the bill that became the Act of March 3, 1905, in a letter dated December 17, 1904, to the Chairman of the Committee on Indian Affairs of the House of Representatives. That letter is printed in House Report No. 4006 and Senate Report No. 4378, 58th Congress, 3rd Session, and explains "that an individual or corporation proposing the expenditure of large sums of money for purposes specified in this bill should be granted the perpetual use of the land upon which such expenditures are to be made." Congressman Jones explained to the House when the bill was passed:

> There is a law enabling companies to secure permits or licenses; but of course they would not want to expend large sums of money on a mere license or permit, so this bill authorizes the acquirement of title to this land. . . .
>
> * * *
>
> It simply affects Indian lands and provides means by which persons can acquire the permanent rights.

In the course of the debate on the House floor, Congressman Jones was asked whether the bill carried the right to dam the Spokane River. And he replied (page 2413 of the Congressional Record),

> Oh, no; not at all. That matter, if it came up, would have to go to the Committee on Interstate and Foreign Commerce. They have to take their chances on that.[18]

There is considerable controversy in this proceeding with respect to the nature of the interests in the lands of the Spokane Indian Reservation granted under the Act of March 3, 1905. While the

Spokane Indian Tribe has asserted a constitutional challenge to WWPC's title under that Act,[19] the presiding judge has said that WWPC's title is not in issue. WWPC contends in its brief on exceptions (1) that it acquired "all federal right, title and interest to the water power and property of the Little Falls development", (2) that the judge decided that it has no title, (3) that the Commission cannot determine its title, and (4) that the government is estopped from challenging its title.

We agree with the presiding judge that it is not necessary to resolve the constitutional challenge to WWPC's title under the Act of March 3, 1905, to determine whether the Little Falls development is required to be licensed under the FPA. If the lands of the Spokane Indian Reservation were granted in fee simple[20] under the Act of March 3, 1905,

they would have ceased being part of that reservation and would no longer have been "reservations" within the purview of Section 3(2) of the FPA,[21] because the United States would not have retained any property interest in them. Accordingly, the continued operation and maintenance of the Little Falls development on those lands would not today be prohibited (without authorization) by reason of that development's utilizing "reservations" of the United States. If, on the other hand, those lands were granted in less than fee simple, as we find, *infra*, (or if the grants are void, which issue is not reached), the United States continues to have a reserved interest in them, they continue to be "reservations" within the purview of Section 3(2), and the continued operation and maintenance of the Little Falls development is prohibited (without

authorization) by reason of its utilizing "reservations" of the United States.

While ordinarily the Commission does not determine issues associated with title to lands, the Commission can and will do so to the extent necessary to administer the FPA. *See Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), wherein the Commission determined whether Indian lands were "reservations" within the purview of Section 3(2) for the purpose of determining whether it would be required to make a finding pursuant to Section 4(e) that the license in question would "not interfere or be inconsistent with the purpose for which such reservation was created or acquired."[22]

The Act of March 3, 1905, is itself the best evidence of the nature of WWPC's title. It empowered Interior to grant land on the Spokane Indian Reservation "whether the same has been allotted in severalty to

any individual Indians, but which has not been conveyed to the allottee with full power of alienation." It appears, therefore, that the persons who drafted that statute were aware of the principal attribute of a fee simple title, which is the full power of alienation, and chose appropriate language to express that attribute to those who would administer or otherwise be interested in the statute. Obviously, Congress could not empower Interior to grant lands within the boundaries of the Spokane Indian Reservation that had already been conveyed to Indians in fee simple. While Interior was expressly prohibited from granting lands that had already been granted with full power of alienation, *Interior was not expressly empowered to make grants with full power of alienation*. Indeed, when Interior ultimately issued a patent in 1924[23] (Exhibit 77), it was in the nature

of quit claim deed as distinguished from a warranty deed in fee simple. The patent recites that the land was granted "to the extent and for the purposes that the Secretary of the Interior is authorized to grant the same under the said act of March 3, 1905 . . ."

The Act of March 3, 1905, empowered Interior to grant lands "such as shall be necessary and requisite . . . for the development of power or for the beneficial use of said water . . ." While the Acting Commissioner of Indian Affairs interpreted the language as granting "the perpetual use of the land", thus suggesting an interest less than a fee simple, Congressman Jones explained that the bill authorized the "acquirement of title" or "permanent rights" rather than a "mere license or permit", which also seems to fall short of a fee simple.

In a letter dated May 5, 1909, to the Assistant Commissioner of Indian Affairs (Exhibit 56), WWPC requested confirmation of its view that a grant under the Act of March 3, 1905, "is an outright sale and conveyance of title and not in the nature of a limited easement, and will only be revocable for non-user." The Acting Commissioner replied on May 8, 1909 (Exhibit 57), that a grant gives "a full and permanent title, revocable only for non-user." If the interest granted is terminable for non-use, as they agreed, it is less than a fee simple, and leaves a reserved interest in the United States. Therefore, WWPC would not have "all federal right, title and interest," as claimed in its brief.

In *United States v. Big Bend Transit Co.*, 42 F.Supp. 459 (E.D.Wash. 1941), the United States District Court for the Eastern District of Washington discussed

the nature of the title granted under the Act of March 3, 1905, stating at 472,

> The defendant [grantee] is claiming here that on December 9, 1939, it had what the Secretary [of the Interior] on May 10, 1923, declared it had; i.e., "a *limited fee on an implied condition of reverter* in the event the grantee ceases to use of retain the land for the purpose indicated in the Act of 1905, the termination of which right of way or limited fee is not vested in the Secretary of the Interior but may be effected upon good cause shown only through proceedings had without the jurisdiction of the Department of the Interior." To my mind, that administrative interpretation of that Act is the only reasonable and proper interpretation [Emphasis added.]

And to our minds, that administrative and judicial interpretation is the only reasonable and proper one. We find, therefore, that the United States has an interest in the lands granted under the Act of March 3, 1905, such that they remain "reservations" of the United States

within the purview of Section 3(2) of the FPA.

We would note, in this connection, that we are not attacking WWPC's title collaterally and impermissibly. In *Big Bend, supra*, the United States sought to condemn lands under the Reclamation Act of 1902 that had been granted under the Act of March 3, 1905, but had not been used for the development of electric power, and wanted to pay nothing for those lands on the ground, among others, that the grantee no longer had any power rights in 1939 when the condemnation proceeding was started. The Court found (42 F.Supp., at 473) that the grantee had spent a large sum of money in reliance upon the 1923 Interior interpretation that its grant was still valid and, therefore, the United States

> cannot here in this proceeding brought as a consequence of the Fifth Amendment to the

> Constitution which requires the payment of just compensation for private property taken for public use, set aside the right of the defendant without compensation therefor. [Citation omitted.] This would amount to a collateral attack on the title acquired by defendant. Such an attack is not permissible. [Citations omitted.]

Here, we are not saying that WWPC has anything less than WWPC itself claimed it had as far back as 1909. We are not taking any private property for public use without the payment of just compensation. We are saying, simply, that the nature of WWPC's title is such that the United States also has an interest that comes within the definition of the term "reservations". And we are so deciding for the purpose of determining whether WWPC's continued operation and maintenance of its Little Falls hydro-electric development within the physical boundaries of the lands granted under the Act of March 3,

1905, is required to be licensed under the FPA. If WWPC obtains entirely new authority under the FPA to continue to operate and maintain that development, including its interest in lands and its water rights at Little Falls, Sections 14(a) and 15(a) of the FPA will require the payment of WWPC's "net investment . . . not to exceed . . . fair value" if that development is taken over by the United States or licensed to another, or "just compensation" if the development is condemned by the United States, the State of Washington or a municipality.

The constitutional objections raised by WWPC with respect to licensing the Little Falls development were addressed by the Supreme Court in *United States v. Appalachian* Electric Power Co., 311 U.S. 377 (1940), at 424 (footnote omitted):

> . . . This power of Congress to regulate commerce is so unfettered that its judgment as

> to whether a structure is or is not a hindrance is conclusive . . ..
>
> Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent upon a license. This power is exercised through § 9 of the Rivers and Harbors Act of 1899 [33 U.S.C. § 401] prohibiting construction without Congressional consent and through § 4(e) of the present Power Act.

The Supreme Court held, at 427 (footnote omitted),

> The respondent urges that as riparian owner with state approval of its plans, it is entitled to freedom in the development of its property and particularly cannot be compelled to submit to the acquisition clause with a price fixed at less than a fair value, in the eminent domain sense, at the time of taking. Such a taking, it is contended, would violate the Fifth Amendment. It is now a question whether the Government in taking over the property may do so at less than a fair value.

> It has been shown . . . that there is no private property in the flow of the stream. This has no assessable value to the riparian owner. If the Government were now to build a dam, it would have to pay the fair value, judicially determined, for the fast land; nothing for the water power. We assume without deciding that by compulsion of the method of acquisition provided in § 14 of the Power Act and the tendered license, these riparian rights may pass to the United States for less than their fair value. *In our view this "is the price which [respondents] must pay to secure the right to maintain their dam."* The quoted words are the conclusion of the opinion in *Fox River* Co. v. Railroad Commission [274 U.S. 651]. The case is decisive on the issue of confiscation. . . The fact that the *Fox River* case involved a state and that this case involves the United States is immaterial from the due process standpoint . . . [Emphasis added].

On the authority of *Appalachian*, we find that the fact that WWPC derives its authority from an act of Congress rather than from State law, as in *Appalachian* and

Fox River, is immaterial from the due process standpoint. We find no merit in the constitutional objections of WWPC.

We turn, next, to the extent of WWPC's authority under its permit or permits granted prior to June 10, 1920.

WWPC'S Limited Authority

Shortly after March 3, 1905, Wilson appropriated a flow of 10,000 cubic feet per second (cfs) at Little Falls pursuant to the laws of the State of Washington and applied under the Act of March 3, 1905, to acquire the right to use the waters of the Spokane River at the point of his appropriation and to purchase 100 acres of the Spokane Indian Reservation on the north bank. By letter dated November 3, 1906, the Secretary of the Interior granted the 100 acres and the right to use the waters, and approved Wilson's application.[24]

On July 8, 1907, Wilson sold his interests in the lands and water rights to

WWPC, and in 1908 the latter began to construct its hydro-electric development, including a dam, at Little Falls, without first submitting its plans to the Chief of Engineers and the Secretary of War and obtaining their approval[25] under Section 9 (pertaining to dams) or 10 (pertaining to obstructions) of the Rivers and Harbors Appropriation Act of 1899 (30 Stat. 1151, now 33 U.S.C. §§ 401 and 403).[26]

WWPC developed Little Falls on the opposite side of the river than contemplated by Wilson and thus utilized lands of the Spokane Indian Reservation that were not included in the interests assigned to it by Wilson. Accordingly, WWPC appropriated a flow of 10,000 cfs pursuant to the laws of the State of Washington and, on May 18, 1908, applied under the Act of March 3, 1905, to acquire the right to use the waters of the Spokane River at the point of its appropriation

and to purchase 8 acres of reservation lands at the same point. The application stated that WWPC had acquired the interests granted by Interior to Wilson on November 3, 1906, and included a copy of the pertinent documents. By letter dated August 28, 1908, the Commissioner of Indian Affairs recommended that the Secretary of the Interior approve the application, stating, among other matters,

> The company in the development of the water-power site purchased from Mr. Wilson has found it necessary to acquire the eight acres under consideration to provide a spillway for the works it is now constructing.

And on August 29, 1908, an Assistant Secretary endorsed his approval.[27]

The Wilson grant that was sold to WWPC was resurveyed jointly by Interior and WWPC in the early part of 1909, and in July 1909 WWPC filed an application under the Act of March 3, 1905, (Exhibit 59, at

6) "solely for the purpose of correcting errors made in the original survey, and placing the line where permanent monuments can readily be established." By letter dated January 24, 1910, the Commissioner of Indian Affairs recommended that the Secretary of the Interior approve the application, and on May 6, 1910, the First Assistant Secretary endorsed his approval.

WWPC completed its Little Falls development in 1910, bringing the hydraulic capacity of the development up to 7,200 cfs.

With respect to the use of waters, we find and conclude that WWPC has a right to utilize 10,000 cfs of the flow of the Spokane River at Little Falls for the development of water power, and that its right includes a permit granted on August 29, 1908, under which WWPC is authorized to so utilize the flow on the reservation side of the river.[28] Since the Little

Falls development has a hydraulic capacity of 7,200 cfs, WWPC is able to operate and maintain the development *under and in accordance with the terms* of the permit insofar as those terms relate to the flow on the reservation side of the river.[29]

From the legislative history of the Act of March 3, 1905, we also find and conclude that the terms of WWPC's permit granted pursuant to its provisions on August 29, 1908, do not include authority to operate and maintain a dam in the Spokane River at Little Falls. The fact that Sections 9 and 10 of the Rivers and Harbors Appropriation Act of 1899 might not have required authorization for construction of the dam and obstruction of the river is irrelevant.[30] The plenary power of Congress to exclude structures from navigable waters, discussed in *Appalachian*, *supra*, is so unfettered that Congress certainly had the power in 1935

to enact a law that would preclude the continued operation and maintenance of existing power dams in navigable waters except under and in accordance with licenses granted by the Commission, whether or not authorization of the construction of those dams or the obstruction of those waters was required by prior or existing law. Congress did just that in the first sentence of Section 23(b) of the FPA,[31] except that Congress also said that licenses would not be required if, on June 10, 1920, the dams were authorized under prior or existing law, and all other authorizations required by the FPA co-existed.[32] Accordingly, WWPC is not able to operate and maintain its Little Falls development under and in accordance with the terms its permit granted August 29, 1908, insofar as those terms relate to its power dam in the Spokane River.

WWPC does not claim to have authority to operate and maintain its power dam at Little Falls under any permits granted prior to June 10, 1920, other than pursuant to the Act of March 3, 1905. Accordingly, we conclude that WWPC is required by the first sentence of Section 23(b) either to cease operating that dam, or to obtain a license under the FPA for the continued operation and maintenance of its Little Falls development, including that dam.

Turning to the matter of "reservations", we find that WWPC has a permit that was granted on August 29, 1908, under which it is authorized to utilize 8 acres of the lands of the Spokane Indian Reservation at Little Falls for the development of water power. Accordingly, WWPC is able to operate and maintain its Little Falls development under and in accordance with the terms of

that permit insofar as involves the 8 acres.

We also find, for the reasons discussed below, that WWPC is able to operate and maintain that development under and in accordance with the terms of the same permit insofar as involves the 100 acres that were granted to Wilson on November 3, 1906, and assigned to WWPC on July 8, 1907.

As concluded earlier, an assignee of a permit that is personal to the permittee, such as permits granted under the Act of March 3, 1905, who has not effected a transfer of the permit to the assignee's name, cannot operate and maintain a water power development "under and in accordance with" its terms within the purview of Section 23(b). It is clear that neither Wilson nor WWPC specifically sought a transfer by Interior of the interests under the Wilson grant, and that

Interior did not specifically authorize such a transfer, at least prior to June 10, 1920. The absence from the record of a copy of an application for transfer suggests that none exists. And while Interior's 1924 patent recites that Interior approved Wilson's application on a specific date, namely, November 3, 1906, and WWPC's application on a specific date, namely, August 29, 1908, it also recites that the assignment from Wilson to WWPC "was approved and recognized by the Secretary of the Interior", without specifying the date of such action.

Nonetheless, WWPC informed Interior of the assignment. And the Assistant Secretary who endorsed his approval of WWPC's application on August 29, 1908, must be held to have clearly understood that the 8 acres were being utilized for a power development in conjunction with the 100 acres that were previously granted to

Wilson. WWPC made the necessary representations in its application and attached a copy of its financial statement, and the Assistant Secretary obviously satisfied himself that *WWPC* made the application in good faith and with intent and ability to use the lands for the purposes specified in the Act of March 3, 1905. While there was no application specifically for a transfer of the Wilson interests to WWPC, there can be no doubt that on August 29, 1908, Interior approved WWPC's utilization of the entire 108 acre tract for a water power development. Even though Interior's regulations under the Act of March 3, 1905, did not require formal approval of the transfer,[33] as such, we find and conclude, as indicated, that WWPC is able to operate and maintain its Little Falls development under and in accordance with the terms of the permit

that was granted on August 29, 1908, insofar as involves the 100 acres.[34]

Having determined that WWPC is required to file an application to amend its license for Project No. 2545 to include the Little Falls development, we turn to WWPC's option under Section 23(a) to continue to operate and maintain that development to the extent of its authority under the permit granted by Interior on August 29, 1908, under the Act of March 3, 1905, or to obtain entirely new authority under the FPA. WWPC should indicate its choice in its application for the license amendment.

All or part of the 108 acres and WWPC's fee simple lands, the use and occupancy of which are necessary or appropriate in the maintenance and operation of the Little Falls development, should be included within the project boundary to the extent required by the

Commission's Regulations under the FPA. Similarly, the right to utilize 10,000 cfs of the flow of the Spokane River, which is necessary or appropriate in the operation of the development, should be included within the license. The 108 acres, or the part thereof within the project boundary, and the 10,000 cfs, (1) will be subject to the burdens of project lands and waters generally, but not entirely, if WWPC chooses to continue to use its existing authority in part, or (2) will be subject to all project burdens if WWPC chooses to obtain entirely new authority.

If WWPC chooses to continue to use its existing authority under its pre-FWPA permit, then, as provided by Section 23(a), the provisions of Part I of the FPA may not be construed as affecting that permit or the authority thereunder. In that case, while the 108 acres, or the part thereof within the project boundary,

and the 10,000 cfs, will be subject to the burdens of project lands and waters generally, we construe Section 23(a) as prohibiting any such burdens that are inconsistent with the terms of the pre-FWPA permit, as follows:

First, Section 10(e) of the FPA requires the Commission to fix annual charges for the purpose of (1) reimbursing the United States for the costs of administering Part I of the FPA, and (2) recompensing the United States for the use, occupancy and enjoyment of its lands or other property. The payment of annual charges for administering Part I of the FPA is a burden of the license, as distinguished from a burden of project lands and waters. It is part of the price to be paid for the privilege of operating and maintaining the power dam in the Spokane River, and is properly payable by WWPC as being not inconsistent with the

terms of its pre-FWPA permit. But, as discussed earlier, we perceive WWPC's interest in the 108 acres as a right to use, occupy and enjoy those lands for the development of water power, indefinitely, as long as they are so used. While the United States has a reserved interest in those lands, it does not have the present right of possession. Nor can the Commission grant WWPC the present right of possession under the FPA if WWPC chooses not to surrender its permit voluntarily, for such action would be prohibited by Section 23(a) as affecting the authority granted under the Act of March 3, 1905. The payment of annual charges for the use, occupancy and enjoyment of project lands that WWPC has an existing right to use, occupy and enjoy for the development of water power under the terms of its pre-FWPA permit, is a burden of project lands that is not properly imposed on WWPC

as being inconsistent with the terms of that permit.[35] On the other hand, a recreational plan is an example of a burden of project lands and waters that is properly imposed as being not inconsistent with the terms of that permit.

And second, we perceive WWPC's interest in the 108 acres and its right to utilize the 10,000 cfs as property rights for which WWPC is entitled to just compensation upon condemnation. To the extent that Sections 14(a) and 15(a) of the FPA would provide for lesser compensation under the net investment formula if in the future the Little Falls development is taken over by the United States or relicensed to another, that would be a burden of project lands and waters that is not properly imposed on WWPC as being inconsistent with the terms of its permit.

In summary, WWPC is required by Section 23(b) to license the continued operation and maintenance of its Little Falls development. But the Commission is required by Section 23(a) to leave unaffected the permit that Interior granted WWPC on August 29, 1908, by protecting the property rights incident thereto. WWPC may in the future be able to show in specific situations that Part I of the FPA is inconsistent with other protected property rights. But, absent such a showing, the Little Falls development will be treated as being fully subject to the provisions of Part I, except with respect to annual charges for the use, occupancy and enjoyment of the 108 acres, or the part thereof within the project boundary, and compensation for WWPC's rights to utilize such lands and the 10,000 cfs flow, upon takeover by the United States or relicensing to another.[36] [37]

The Commission further finds in lieu of the fifth additional finding and conclusion of the presiding judge:

The Washington Water Power Company operates and maintains the Little Falls Dam in and across the Spokane River, a navigable water of the United States within the State of Washington, together with conduits, a power house, and other works of the Little Falls project incidental to the development of electric power across, along or in the Spokane River, partly under and in accordance with the terms of a permit granted prior to June 10, 1920, and partly without having a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to the Federal Power Act, in violation of Section 23(b) of the Federal Power Act.

The Commission orders:

(A) The Initial Decision issued April 1, 1980, is affirmed as modified by Ordering Paragraph (B) hereof.

(B) Within 90 days of the date of this opinion and order, The Washington Water Power Company shall file an application pursuant to the Federal Power Act and the Commission's Rules and Regulations thereunder to amend its license for Project No. 2545 to include as part of the project the Little Falls development. Nonetheless, as provided by Section 23(a) of the Federal Power Act, The Washington Water Power Company may elect in the application to continue to operate and maintain that development under and in accordance with the terms of the permit granted by the Secretary of the Interior on August 29, 1908, to the extent of its authority as determined in this opinion and order, and, in that event, the

provisions of Part I of the Federal Power Act shall not be construed as affecting that permit or the authority thereunder, as so determined.

(C) All exceptions not granted shall be deemed denied.

(D) The motion for oral argument filed by The Washington Water Power Company on April 30, 1980, and renewed on September 2, 1980, is denied.

(E) The petition to reopen the proceeding filed by The Washington Water Power Company on February 13, 1981, is granted, and the proceeding is hereby reopened for the limited purpose of receiving into evidence the eight pages appended to the petition consisting of a copy of the transmittal letter dated January 28, 1981, of the National Archives and Records Service of the General Services Administration, and a copy of the regulations of the Department of the

Interior under the Act of March 3, 1905. The eight pages shall be designated collectively as Exhibit No. 160.

—Footnotes—

[1] The Federal Water Power Act was amended in 1935 to change its name to the Federal Power Act, modify certain existing provisions substantively and designate them as Part I, and enact Parts II and III. It is customary to distinguish between the pre- and post-amendment statute by its pre- and post-amendment names in the context that the FPA, as a new statute, superseded the FWPA.

[2] The FWPA was oriented toward voluntary applications to obtain the benefits of water power licenses. As more fully discussed in Opinion No. 2 (Puget Sound Power and Light Company, Project No. 2494), issued October 28, 1977, licensing applications were made mandatory in 1935 at which time Section 23 was divided into two subsections and the first sentence of Section 23(b) was enacted.

[3] The term "Commission" refers to the Federal Power Commission in contexts prior to October 1, 1977, and to the Federal Energy Regulatory Commission in contexts on and after that date.

[4] However, Section 23(b) differs in some respects from Section 4(e), so that the scope of the Commission's licensing authority under Section 4(e) is broader than the scope of the licensing requirement of Section 23(b).

[5] *E.g.*, *The Montana Power Company v. Federal Power Commission*, 445 F.2d 739 (D.C. Cir. 1970), at 750.

[6] However, until 1930 the Commission consisted of the Secretaries whose authorities were abolished.

[7] "Congress intended that the right to make application under section 23 of the act should be limited to those who, on the date of approval of the act, were possessed of authority theretofore lawfully granted." But an assignee of a permit that is personal in nature is not possessed of such authority. Opinion of the Chief Counsel to the Executive Secretary in re Southern California Edison Company, dated February 23, 1927. Seventh Annual Report of the Federal Power Commission (1927), 142, at 146-147.

[8] "[O]n the passage of the Federal Water Power Act the authority of the Secretary of Agriculture to approve transfers or assignments of water power permits ceased and determined, and a like authority was immediately vested in the Federal Power Commission." 32 Opinions of Attorneys General 525 (1921), at 531.

[9] Some statutes, such as the Act of March 3, 1905, involved herein, gave the Secretary of the Interior authority with respect to waters associated with government lands.

[10] *Montana Power Company v. Federal Power Commission*, 185 F.2d 491 (D.C. Cir. 1950) at 496, affirming in relevant part The Montana Power Company, 7 FPC 163 (1948).

[11] Senate Report No. 621 (at 47) and House Report No. 1318 (at 25), 74th Congress, 1st Session, *infra*.

[12] "[A]ll federal grants are construed in favor of the Government lest they be enlarged to include more than what was expressly included." *United States v. Grand River Dam*

Authority, 363 U.S. 229 (1960), at 235; *The Northwest Paper Company v. Federal Power Commission*, 344 F.2d (8th Cir. 1965), at 51. "Statutes said to restrict the power of government by the creation of private rights are, like other public grants, to be strictly construed for the protection of the public interest." *Reichelderfer v. Quinn*, 287 U.S. 315 (1932); *The Northwest Paper Company v. Federal Power Commission*, *supra*, at 51. Under these principles, pre-FWPA grants of what is now partial authority should be construed to the extent practicable as not being affected by the FPA but, nonetheless, as not being sufficient under Section 23(b) to avoid licensing.

[13] Interior's practice of endorsing approvals is mentioned in The Long Struggle for Effective Water Power Legislation by Gifford Pinchot, 14 The George Washington University Law Review 9 (1945), at 11.

[14] *Montana Power Company v. Federal Power Commission*, 185 F.2d 491 (D.C. Cir. 1950).

[15] Congressman Jones explained to the House when the bill was passed,

> [T]he question of the acquirement of water rights on the reservation is a matter of some doubt. This bill simply authorizes the acquirement of water rights on the reservation side of the river under the laws of the State of Washington, and the committee has put in a further restriction that it must be with the consent of the Secretary of the Interior. *See* page 2413 of the Congressional Record appended to the Initial Brief of the Spokane Indian Tribe.

[16] A proviso said

> That no lands shall be granted under this Act until after the Secretary of the Interior is satisfied that the person, association, or company applying has made said application in good faith and with intent and ability to use said lands for the purposes above specified and that it requires the quantity of land applied for in such use. . . .

[17] Early in 1981 WWPC finally obtained a copy from the National Archives and Records Service of the General Services Administration and, on February 13, 1981, petitioned to reopen the record of this proceeding for the limited purpose of receiving the regulations into evidence. As discussed *infra*, in note 37, the copy of the regulations is being admitted into evidence.

[18] It should be noted that all hydro-electric projects do not involve the construction of dams or other obstructions in waterways. For example, Project No. 176 diverted water from a river through a tunnel in one bank of the river, as discussed in Opinion No. 36, at 10 (*Escondido Mutual Water Company*, Project No. 176), issued February 26, 1979.

[19] WWPC's title is derived from the grant of 100 acres to Wilson that was assigned by Wilson to WWPC, and from the grant of 8 acres to WWPC.

[20] We use the term "fee simple" as being synonymous with "fee simple absolute" and signifying an inheritable estate free from any conditions or restrictions--the largest estate and most extensive interest in land. *See* Black's Law Dictionary, Revised Fourth Edition (1968), at 742. It is to be

distinguished from a lesser estate which is variously known as a "conditional fee" or a "fee simple conditional", such as a condition of termination if the land is not used for the development of water power within a reasonable period of time (see *Big Bend*, *infra*), or a condition of termination if land used for the development of water power is no longer used for that purpose.

[21] "[R]eservations" means national forest, tribal lands embraced within Indian reservations, military reservations, and other lands and *interests in lands* owned by the United States and withdrawn, reserved, or withheld from private appropriation and disposal under the public laws; also lands and *interests in lands* acquired and held for any public purposes; but shall not include national monuments or national parks . . . [Emphasis added].

[22] *Federal Power Commission v. Louisiana Power and Light Company*, 406 U.S. 621, 647-648 (1972). Section 4(g) of the FPA authorizes the Commission, on its own motion, to investigate any occupancy of "reservations" for the purpose of developing electric power, and to issue such order as it may find appropriate and in the public interest to conserve and utilize the water power resources of the region. Certainly, that authority is broad enough to empower the Commission to determine whether particular interests in land are "reservations" within the purview of the FPA.

The case cited by WWPC (*The Niagara Falls Power Company*, Project No. 16), 1 FPC 716 (1938), was said to have been "in the nature of a suit to try title to the lands and adjacent waters utilized by Project No. 16." Although it continues to be authoritative with respect to title to water in the light of Section 27 of the FPA, it has been superseded by

Tuscarora and is no longer authoritative with respect to issues associated with title to lands.

[23] Since June 10, 1920, is the critical date for authorization other than a license under the FPA, we will not decide whether Interior was still authorized in 1924 to issue a patent covering its grant to Wilson that was assigned to WWPC, as well as its grant to WWPC. *See* the 1921 opinion of the Attorney General, *supra*. Interior and the Spokane Indian Tribe contend in their briefs opposing exceptions that the Act of March 3, 1905, did not authorize the 1924 patent.]

[24] Wilson submitted an application dated April 5, 1905 (Exhibit 5), which, as amended January 24, 1906 (Exhibit 11), and resubmitted, sought 245 acres of the Spokane Indian Reservation, but was approved as to 209 acres on May 4, 1906 (Exhibit 16). Thereafter, Wilson submitted an application dated September 22, 1906 (Exhibit 19), which sought "additional land" within the Spokane Indian Reservation included within a metes and bounds description covering 100 acres, more or less. The latter application was approved on November 3, 1906 (Exhibit 23), on the condition that Wilson relinquish "all rights heretofore acquired by virtue of Department approval on May 8, [sic., 4] 1906, of his former application."

Tribal damages were assessed and paid on the basis of 100 acres (Exhibit 23) and, therefore, the Wilson grant is said throughout this opinion to be 100 acres. Similarly, the WWPC grant, *infra*, is said to be 8 acres, although in reality both grants may differ from those nominal amounts.

[25] As mentioned earlier, Congressman Jones told Congress that the Act of March 3, 1905, did not carry the right to dam the Spokane River.

[26] Section 9 provided, in pertinent part,

> That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided*, that such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced. . . . WWPC claims that it was not required to obtain authorization thereunder because the Spokane River was not considered navigable at that time. While its claim respecting navigability is supported by Congressman Jones' statement to the House (page 2413 of the Congressional Record), that is irrelevant, as mentioned earlier.

[27] The endorsement of the Assistant Secretary was departmental approval. Exhibit 62 states, in this connection, that WWPC's application to purchase the 8 acres was approved on August 29, 1908.

[28] While the authority of Congress to grant water rights has been challenged, the fact that Congress specified that appropriations must be under and pursuant to the laws of the

State of Washington, moots that challenge. WWPC appears to have complied with the laws of the State of Washington and to have received a grant from Interior.

[29] In other words, even though Interior's regulations under the Act of March 3, 1905, did not require Interior's approval of the transfer of the Wilson permit granted on November 3, 1906, WWPC is not able to operate and maintain the development "under" the terms of that permit, within the purview of Section 23(b), because only Wilson, as permittee, could do so. But the terms of WWPC's permit granted on August 29, 1908, are broad enough to include the interests under the Wilson permit that were assigned to WWPC on July 8, 1907.

[30] *See Pennsylvania Water & Power Co. v. Federal Power Commission*, 123 F.2d 155 (D.C. Cir. 1941), at 161-3, *cert. denied* 315 U.S. 806 (1942), which holds that Section 23(b) applies to a dam constructed prior to June 10, 1920, in waters that were not considered navigable at the time of construction.

[31] Senate Report No. 621, 74th Congress, 1st Session, describes the purpose of the first sentence of Section 23(b) at 47, as follows:

> [A] provision is inserted expressly making it unlawful to construct a project on any navigable waters without a license granted pursuant to the act. *This latter provision is in substance the effect of the River and Harbor Act of 1899 when read with the Water Power Act*. It is thought desirable to bring together in a single act the positive requirements regarding the construction of water power projects. . . . *The act*

> *would be greatly strengthened by enabling the Commission to preserve control over all projects with which the Federal Government has any valid concern* [Emphasis added].

See, also, House Report No. 1318, 74th Congress, 1st Session, at 25.

While it could be argued that § 9 of the Rivers and Harbors Appropriation Act of 1899 prohibits only the construction of dams without authorization, we believe that a requirement for authority to construct a dam implicitly includes a requirement for authority to operate and maintain the dam for the period of its useful life. In *Sanitary District of Chicago v. United States*, 266 U.S. 405 (1925), the Supreme Court said, at 429, with respect to § 10 of that Act (33 U.S.C. § 403), which prohibits, among other things, the creation of unauthorized obstructions to the navigable capacity of waters of the United States,

> There is neither reason nor opportunity for a construction that would not cover the present case. . . . It is applied prospectively to the water henceforth to be withdrawn. *See, also*, the quoted portion of *Appalachian, supra*, which suggests that § 9 deals with the maintenance as well as the erection of structures in navigable waters, and *Pennsylvania Water & Power Co. v. Federal Power Commission, supra*.

See, also, the quoted portion of *Appalachian, supra*, which suggests that § 9 deals with the maintenance as well as the erection of structures in navigable waters, and *Pennsylvania Water & Power Co. v. Federal Power Commission, supra*.

[32] The FPA logically must reach dams that were not reached by Sections 9 and 10 of the Rivers and Harbors Appropriation Act of 1899 because the term "navigable waters" is defined broadly in the FPA and reaches waters that may not be navigable in fact, such as "parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority."

[33] In this respect, the regulations under the Act of March 3, 1905, were different from the regulations under the Act of February 15, 1901, that were involved in *The Montana Power Company v. Federal Power Commission*, *supra*, and required formal approval of transfers.

[34] Furthermore, after the boundaries of the Wilson grant were resurveyed in 1909, Interior approved WWPC's application to correct the errors made in the original survey. Such action was consistent with Interior's having approved WWPC's utilization of the 100 acres for a water power development, and is consistent with our conclusion that the terms of WWPC's permit granted August 29, 1908, include the utilization of all 108 acres.

[35] Of course, if the WWPC permit is challenged successfully, the Spokane Indian Tribe would be entitled to annual charges from the date of the license amendment. It would be appropriate to condition the license amendment to provide for such a contingency if timely litigation is initiated for that purpose.

[36] On September 2, 1980, WWPC filed a document seeking to renew its motion for oral argument filed April 30, 1980,

on the grounds that (1) the briefs opposing exceptions contain inaccurate statements and allegations, as well as statements which belong in briefs on exceptions, and (2) the Commission's rules do not give WWPC an opportunity to reply or respond. Improper material in briefs opposing exceptions may be challenged through a motion to strike filed pursuant to § 1.12 of the Commission's Rules of Practice and Procedure, or corrected through a motion for leave to file a reply or response to the brief opposing exceptions, accompanying a tendered reply or response. Since WWPC does not in its motion point out specific inaccuracies or improper material, we are unable to treat it other than as cumulative of its earlier motion for oral argument.

[37] On February 13, 1981, WWPC filed a petition pursuant to § 1.33(c) of the Commission's Rules of Practice and Procedure to reopen this proceeding for the limited purpose of receiving into evidence eight pages consisting of a copy of Interior's regulations under the Act of March 3, 1905 (seven pages, including one page from the back of one of the pages of the regulations specifying The National Archives' file location of the original), and a copy of a transmittal letter pertaining to the regulations dated January 28, 1981, from the National Archives and Records Service of the General Services Administration, to WWPC's counsel (one page). The Commission staff counsel, Interior and the Spokane Indian Tribe indicated in response that they did not object to reopening the proceeding for the limited purpose of admitting the regulations into evidence. The arguments contained in the filings were considered solely for that purpose.

We find that the regulations are relevant and material to the issues herein and were not available to the parties earlier, and, therefore, that the proceeding should be

reopened for the limited purpose of admitting them into evidence. Such hearsay evidence has probative value and is admissible in administrative proceedings under the FPA. *See* the discussion of Section 308(b) in *The Montana Power Company v. Federal Power Commission*, *supra*, 185 F.2d, at 497. Furthermore, the regulations are admissible under an exception to the hearsay rule as an historic public document. Although they lack the testimony or official seal of their custodian to establish that they are what they purport to be, none of the parties has objected to their authenticity and, therefore, any objections thereto and to the granting of the petition are deemed waived as provided by § 1.33(a)(2) of the Commission's Rules of Practice and Procedure.